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## INCENTIVE CONDITIONS: THE VALIDITY OF INNOVATIVE FINANCIAL PARENTING BY PASSING ALONG WEALTH AND VALUES

### I. INTRODUCTION

An incentive condition is a provision in a will or trust that is meant to induce or motivate a beneficiary to act in order to receive money from a testator.<sup>1</sup> States need to adopt statutes that allow incentive conditions within certain limitations to avoid potential conflict, confusion, and litigation.<sup>2</sup> Further, in order to address the public policy concerns regarding incentive trusts, states should codify specific limitations to drafting incentive conditions.<sup>3</sup>

Baby-boomers will give an estimated twenty-five trillion dollars through inheritances during the next fifty years.<sup>4</sup> Parents and grandparents are increasingly concerned about the negative consequences that inherited wealth may have on their heirs.<sup>5</sup> While wealth transmissions of yesterday tended to center on major items of patrimony, today's wealth transmissions center on the investment in values and skills.<sup>6</sup> Thus, while planning how to dispense their wealth, many people are planning how to pass down their work ethic, religion, educational goals, and philanthropic values by creating wills and trusts containing incentive conditions.<sup>7</sup>

In order to determine the validity of a given incentive condition, the *Restatement (Third) of Trusts* proposes three guidelines.<sup>8</sup> According to the Restatement, although an individual is free to give or withhold property from another during his lifetime, it does not follow that the individual can attach whatever terms or conditions he chooses to attach by trust.<sup>9</sup>

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<sup>1</sup> See *infra* Part II.C. For a definition of "testator," see note 29.

<sup>2</sup> See *infra* Part III.

<sup>3</sup> See *infra* Parts III-IV.

<sup>4</sup> Mary Hickok, *Family Incentive Trusts Pass Along Values Too: Concerns About Spoiling Heirs Have Boosted the Popularity of Such Plans*, 26 NAT'L L.J. 16, 16 (2004). Attorneys and other trust professionals will be the key to the success of the transfer process. *Id.*; see also Ellen E. Whiting, *Controlling Behavior by Controlling the Inheritance: Considerations in Drafting Incentive Provisions*, 15 PROB. & PROP. 6 (Sept./Oct. 2001).

<sup>5</sup> Whiting, *supra* note 4. Some of the concerns include wasting the inherited, easily attained money; not learning to be a productive, hard working citizen; or practicing a particular religion. *Id.*

<sup>6</sup> John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988); see *infra* note 54 and accompanying text.

<sup>7</sup> Hickok, *supra* note 4, at 16.

<sup>8</sup> See *infra* Part II.D.

<sup>9</sup> See *infra* Part II.

Though the Restatement sets forth some guidelines, there still exists a gray area as to the validity of a designed condition in a trust.<sup>10</sup> In addition, many states lack codified language and vary in treatment concerning incentive conditions, which will inevitably lead to conflict, confusion, and unnecessary litigation.<sup>11</sup>

To avoid litigation that may arise in the future when incentive trusts are interpreted, states must adopt statutes dealing with the requirements and validity of an incentive condition.<sup>12</sup> In order to address concerns regarding a beneficiary's choice and dead-hand control while still allowing individuals to freely distribute their wealth, states should adopt statutes that provide specific limitations to drafting incentive conditions.<sup>13</sup>

This Note first sets forth the background of estate planning and incentive conditions, discussing case law and the Restatement's treatment of incentive conditions.<sup>14</sup> Next, this Note analyzes why states should allow incentive conditions within certain limitations and why the current case law, statutes, and Restatements do not sufficiently address incentive conditions.<sup>15</sup> Finally, this Note sets forth a suggested statute that a state should adopt to consistently address the treatment of incentive conditions.<sup>16</sup>

## II. BACKGROUND

Through incentive trusts, individuals attach contingencies on transfers of their wealth based on work ethic, religion, and education because many individuals planning how to distribute their wealth are concerned with passing along their values and morals.<sup>17</sup> Further,

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<sup>10</sup> See *infra* Part II.

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *infra* Part II.

<sup>13</sup> See *infra* Part III. Despite the view of a state, it is imperative that states adopt some statutory provision to deal with incentive conditions to avoid tying up its courts with litigation. *Id.* For a definition of dead-hand control, see *infra* note 78.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Parts III.A-B.

<sup>16</sup> See *infra* Part IV.

<sup>17</sup> Hickock, *supra* note 4. For example, in *Shapira v. Union National Bank*, 315 N.E.2d 825 (Ohio App. 1974), a father was concerned about supporting the Jewish religion and conditioned his son's inheritance on his marriage to a Jewish woman. *Id.* at 826; see *infra* notes 122-24 and accompanying text. For example, parents are concerned that their children will not learn to appreciate working hard, will not get an education, and will rely on inherited wealth, making the children unproductive citizens. Hickock, *supra* note 4, at 16.

individuals now describe behavioral incentive conditions using a great deal of creative freedom.<sup>18</sup> Some individuals act as if the sky is the limit with respect to the freedom they use in drafting incentive conditions.<sup>19</sup> However, in some cases, courts have ruled that particular incentive conditions contained in a will or trust are invalid, causing a transfer of wealth in a way not desired by the individual who made the will or trust.<sup>20</sup> First, Part II.A discusses the general background of estate planning, and Part II.B discusses individual state statutes that are pertinent to estate planning.<sup>21</sup> Next, Part II.C discusses incentive conditions in general.<sup>22</sup> Part II.D describes the Restatement's treatment of incentive conditions.<sup>23</sup> Finally, Part II.E discusses the varying methods utilized in treating specific types of incentive conditions, including in *terrorem* clauses, marriage and family relationships, religion, the language of the condition, and state regulation of incentive conditions.<sup>24</sup>

#### A. *General Background of Estate Planning*

The goal of an estate plan is to ensure that one's property passes to those whom he wishes to receive it, in the manner in which he wishes them to receive it, and at a minimum cost.<sup>25</sup> The cost of an estate plan is measured in terms of administration expenses, court costs, attorneys' fees, and taxes.<sup>26</sup> In order to accomplish his specific goals, a property

<sup>18</sup> See *infra* note 62 and accompanying text.

<sup>19</sup> See *infra* note 62 and accompanying text.

<sup>20</sup> See *infra* Part II.E.

<sup>21</sup> See *infra* Parts II.A-B.

<sup>22</sup> See *infra* Part II.C.

<sup>23</sup> See *infra* Part II.D.

<sup>24</sup> See *infra* Part II.E.

<sup>25</sup> ALINE F. ANDERSON & DIANE HUBBARD KENNEDY, *ANDERSON'S WILLS, TRUSTS AND ESTATE PLANNING* § 1:1 (2004). Anderson and Kennedy state:

The goal of estate planning is to transfer property upon death, taking into account the owner's desires and possible tax administrative costs. The planner must consider the client's assets, their fair market value, the manner in which the assets are titled, the intended beneficiaries and federal and state tax ramifications.

*Id.* For a history of estate planning administration, see Sarajane Love, *Estate Creditors, the Constitution, and the Uniform Probate Code*, 30 U. RICH. L. REV. 411, 415-25 (1996).

<sup>26</sup> ANDERSON & KENNEDY, *supra* note 25, § 1:1. Unless legislation changes the Internal Revenue Code, estate tax is phasing out entirely and will not exist for one year as of the year 2010. 26 U.S.C. § 2001 (2004).

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owner has options to transfer what he owns by means of a will, trust, or a state's intestate laws.<sup>27</sup>

A will is a purely testamentary legal tool that is effective only after the death of its maker.<sup>28</sup> The testator specifies certain individuals as beneficiaries, defines what each beneficiary will receive, and appoints an executor to handle the work.<sup>29</sup> The will controls disposition of property held in the testator's name alone.<sup>30</sup> The property becomes payable to the testator's probate estate after his death.<sup>31</sup> A properly drafted will can

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<sup>27</sup> ANDERSON & KENNEDY, *supra* note 25, § 1:1. When a property owner does not have a will at the time of his death, intestacy is the result and statutes establish an estate plan. *Id.* § 1:11. Also, individuals can transfer wealth by gift, which is a transfer of property during the lifetime of the transferor for less than full and adequate consideration. 26 U.S.C. § 2053(c)(1)(A) (2004). When an individual dies and probate is necessary, a personal representative must oversee the winding up of the decedent's estate. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 35 (6th ed. 2000). The personal representative examines and collects the assets of the decedent, manages the assets during administration, receives and pays the claims of creditors, and distributes the remaining assets to those entitled. *Id.* at 35, 36. Further, personal representatives, if not named by the will, are appointed by the probate court and are under the control of and accountable to the probate court. *Id.* at 36; *see infra* note 31.

<sup>28</sup> *See* ANDERSON & KENNEDY, *supra* note 25, § 2:1; Paul Premack, *Difference Between Trust & Will* (Mar. 4, 2003), available at <http://www.premack.com/columns/2003/2003-03-04.htm>.

<sup>29</sup> Premack, *supra* note 28. Testator is defined as, "[a] person who has made a will; esp., a person who dies leaving a will." BLACK'S LAW DICTIONARY 1514 (8th ed. 2004). While a testator is a *man* who makes a will, a testatrix is a *woman* who makes a will. GERRY W. BEYER, WILLS, TRUSTS, AND ESTATES 5 (2d ed. 2002). An executor is the person the testator names to carry out the provisions of his will. BLACK'S LAW DICTIONARY 610 (8th ed. 2004). Although a will can establish a trust in order to impose restrictions on certain heirs, that trust operates only after the will has been probated. Premack, *supra* note 28. The executor receives legal credentials to act for the decedent's estate upon the death of the maker of the will. MAYER BROWN ROWE & MAW, INTRODUCTION TO ESTATE PLANNING 1 (2003). The executor is the personal representative that is named in a will of a decedent who dies testate. DUKEMINIER & JOHANSON, *supra* note 27, at 36. One of the advantages of having a will as opposed to dying intestate is that the testator can name the executor of his estate. *Id.* If a person dies intestate or fails to name an executor who can administer the estate, the administrator is selected from a statutory list of individuals in the following order: surviving spouse, children, parents, siblings, creditors. *Id.*

<sup>30</sup> MAYER BROWN ROWE & MAW, *supra* note 29, at 1. A settlor is "a person who furnishes, either directly or indirectly, the consideration or corpus for a trust." *Id.* Disposition of property refers to the distribution of the testator's property to those who are entitled to the property. DUKEMINIER & JOHANSON, *supra* note 27, at 36.

<sup>31</sup> BEYER, *supra* note 29, at 3. Probate is the legal process through which a will is activated. Premack, *supra* note 28. Further, "[t]here are three major functions of probate, which is the administration of the decedent's estate: (1) to provide evidence of transfer of title, (2) to protect creditors by requiring payment of debts, and (3) to distribute the decedent's property according to his or her intent." Melissa B. Vegter, Comment, *The "ART" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent Before*

make the probate process more efficient by eliminating court supervision of the executor, who completes the decedent's remaining business and distributes the remaining assets.<sup>32</sup> If an individual has no will, the intestacy laws of the state in which he is a legal resident generally control the disposition of his property.<sup>33</sup>

A trust, on the other hand, is a fiduciary relationship concerning property management arrangements in which one person, the trustee, manages assets for the benefit of another person, the beneficiary.<sup>34</sup> In

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*Posthumously Conceived Children Can Inherit from a Deceased Parent's Estate*, 38 VAL. U. L. REV. 267, 315 n.32 (2003) (referring to DUKEMINIER & JOHANSON, *supra* note 27, at 39).

<sup>32</sup> Premack, *supra* note 28. Sometimes the will's maker desires court supervision or fails to waive it. *Id.* If so, probate can become a slow, detailed process. *Id.* Further, the administrative costs of probate include fees from probate court, an attorney, personal representatives, appraisers, and guardian ad litem. DUKEMINIER & JOHANSON, *supra* note 27, at 44.

<sup>33</sup> ANDERSON & KENNEDY, *supra* note 25, § 1:11. A state's intestacy laws distribute property of a decedent who has died without a will according to state statutes that were written by the legislature. DUKEMINIER & JOHANSON, *supra* note 27, at 72. In drafting a state's intestacy laws, the legislature made its best guess as to how the decedent would have distributed his money if he had made a will. *Id.* One-third of the states follow the model Uniform Probate Code's intestate section. *Id.* Regarding an intestate estate, the Uniform Probate Code states:

(a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this Code, except as modified by the decedent's will. (b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his [or her] intestate share.

UNIF. PROBATE CODE § 2-101 (amended 1993). Other states, such as Indiana, have adopted their own code. IND. CODE § 29-1-2-1 (2004). For example, the Indiana Code lists several circumstances in which to give out property of a person who has died intestate. *Id.* The state code provides that property belonging to a person dying intestate shall pass to the surviving spouse if there is no surviving issue or parent of the deceased. *Id.* § 29-1-2-1(b)(3). If the person is survived by at least one child or the issue of at least one deceased child, the surviving spouse gets one-half of the property. *Id.* § 29-1-2-1(b)(1). The surviving spouse shall receive three-fourths of the net estate when there are no surviving children but one or both of the decedent's parents are surviving. *Id.* § 29-1-2-1(b)(2). After giving the surviving spouse his share, the remaining property is distributed using the following hierarchy list: the decedent's children, the surviving parents if there is a surviving spouse and no surviving children, the surviving parents and siblings including children of deceased siblings, the nephews and nieces, and the grandparents. *Id.* § 29-1-2-1(d). If money is left over after descending through the list, then the money goes to the state. *Id.* § 29-1-2-1(d)(8).

<sup>34</sup> GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 1 (2d ed. 1984 & Supp. 2004). The person for whom a trust is established is called the "beneficiary."

addition, a property owner may transfer property to a trust during his lifetime, and the terms of the trust document control the disposition of the property during the life and after the death of the settlor.<sup>35</sup>

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*Id.* Where the beneficiary is an individual, the trust is a private trust. *Id.* An artificial legal entity, such as a corporation, may also serve as a beneficiary to a trust. *Id.* The beneficiary of a charitable trust is the public. *Id.* “[A] trust is a fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another.” *Jewish Cmty. Ass’n v. Cmty. Bank*, 6 P.3d 1264, 1266 (Wyo. 2000) (quoting *Scotti’s Drive In Restaurants, Inc. v. Mile High Oil-Dart In Corp.*, 526 P.2d 1193, 1196 (Wyo. 1974)). A trustee is a person who holds title to property in a trust and has the duty to manage the property according to the instructions of the settlor and applicable trust law. BEYER, *supra* note 29, at 5.

<sup>35</sup> MAYER BROWN ROWE & MAW, *supra* note 29, at 2. The person who intentionally causes the trust to come into existence is called the “settlor.” BOGERT & BOGERT, *supra* note 34, § 1. This individual who creates the trust is often called the trustor, grantor, founder, donor, or creator of the trust. *Id.* Where the trust is created by will, the individual who created the trust is called the testator. *Id.* Trusts are revocable or irrevocable, tax-motivated or tax-neutral, and testamentary or inter-vivos. Premack, *supra* note 28. A “living trust” is a special trust subcategory that is revocable, tax-neutral, and operates both during and after the lifetime of the creator of the trust. *Id.* At its inception, a living trust’s assets are usually managed by its creator unless he becomes disabled. *Id.* If the creator becomes disabled, an alternate trustee takes over and uses the trust assets to pay bills, buy food, and provide shelter and care for the trust creator. *Id.* When the trust creator dies, the alternate trustee enacts provisions that identify alternate beneficiaries, distributing assets to specific individuals. *Id.* The property owner is called the testator if male and the testatrix if female. MAYER BROWN ROWE & MAW, *supra* note 29, at 2. The trust property is the property interest, real or personal, tangible or intangible, which the trustee holds, subject to the rights of the beneficiary. BOGERT & BOGERT, *supra* note 34, § 1. In order to create a valid private trust, the trust instrument must contain: (1) an expression of intent to hold property for the benefit of a person other than the settlor, (2) the name of at least one beneficiary, and (3) an interest in property that is in existence or is ascertainable and held for the benefit of the beneficiary. *Id.* Trust instrument refers to the document, whether a deed, agreement, or will, in which the settlor or testator expresses an intent to have a trust and provides the details of the trust, the trust terms. *Id.* A trust instrument is not needed when a trust is created without a writing. *Id.* When the trust is created without an instrument, the terms of the trust are determined by evidence of the settlor’s intent. *Id.* A trust that does not involve any written instrument is called an implied trust, while a trust that goes through the requisite formalities is called an express trust. *Id.* § 8. A trust may be created by:

- (a) a transfer by the will of a property owner to another person as trustee for one or more persons; or
- (b) a transfer inter vivos by a property owner to another person as trustee for one or more persons; or
- (c) a declaration by an owner of property that he or she holds that property as trustee for one or more persons; or
- (d) an exercise of a power of appointment by appointing property to a person as trustee for one or more persons who are objects of the power; or
- (e) a promise or beneficiary designation that creates enforceable rights in a person who immediately or later holds those rights as trustee, or who pursuant to those rights later receives property as trustee, for one or more persons.

Typically, after-death distributions under a trust are implemented privately without the need for probate.<sup>36</sup> A trust avoids probate because the trust creator, while still living, transfers assets into the name of the trustee or name of the trust.<sup>37</sup> If any assets were not transferred to the trust, those assets may still pass according to the stipulations described in the will or by way of intestacy.<sup>38</sup> Thus, while wills are less expensive initially, they usually require probate, which renders them more expensive and more time consuming to execute.<sup>39</sup> Trusts, on the other hand, are initially more expensive, but because they usually avoid the probate process, they are ultimately less expensive and less time consuming.<sup>40</sup> Just as trusts are created to manage a testator's property, states have also developed statutes to manage the intricacies of trusts.

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RESTATEMENT (THIRD) OF TRUSTS § 10 (2003). In addition, trusts are classified with respect to their method of creation and with respect to the point of view of the purpose or objective of the trust. BOGERT & BOGERT, *supra* note 34, § 1. Regarding classifications based on the method of creation, a settlor creates a living trust when the settlor is a living settlor. *Id.* When the source of the trust is the creator's will, a testamentary trust is created. *Id.* Private trusts exist for the benefit of one or more individuals, while charitable or public trusts exist for the advantage of society or a large segment of society. *Id.* Regarding instances when trusts are classified from the point of view of its objective, family trusts are used when the primary purpose is to distribute property among relatives. *Id.* at 13. Business or commercial objectives, when in a trust, are called business trusts. *Id.* An investment trust is a trust used to furnish and administer funds for investments. *Id.*

<sup>36</sup> Premack, *supra* note 28.

<sup>37</sup> *Id.* For example, any real estate owned by the trust creator should have been deeded to the trustee at about the same time the trust was created. *Id.* The concept of transferring assets is called "funding" the trust and is what eventually avoids probate. *Id.* Assets that were transferred to the trustee are under the trustee's legal control. *Id.* The death of the trust creator does not change that control; rather, it is a signal to the trustee to enact the provisions identifying alternate beneficiaries. *Id.*; see *supra* note 35.

<sup>38</sup> Premack, *supra* note 28. Thus, a living trust is not an absolute guarantee that there will not also be a probate. *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Fiduciary Trust Co. Int'l, *Revocable Trusts Advantages, Disadvantages and Myths* (2004), available at [http://www.ftci.com/jsp/content.jsp?url=/commentary/FTL\\_Trust\\_Topics/RevocableTrusts](http://www.ftci.com/jsp/content.jsp?url=/commentary/FTL_Trust_Topics/RevocableTrusts). How much of a benefit it may be varies from one place to the next. *Id.* For example, avoiding probate may be a significant benefit for a person who owns real estate in more than one state because he can avoid multiple probate proceedings. *Id.* Because each jurisdiction's probate process is different, it is necessary to consult local counsel to determine which, if any, disadvantages of probate apply. Premack, *supra* note 28. Trusts and wills are two different roads that lead to the same destination. *Id.* Which road is selected depends on individual needs and preferences. *Id.* Regarding intestacy, some of the disadvantages to intestacy are that intended beneficiaries may get nothing and that beneficiaries take shares outright, regardless of whether the beneficiary can handle the property. ANDERSON & KENNEDY, *supra* note 25, § 1:12.

## B. State Regulation of Trusts

At the end of the eighteenth century, when trusts came into common use in America, litigated disputes were common despite the poverty and newness of America.<sup>41</sup> However, since the beginning of the nineteenth century, trust law has greatly developed in order to adapt to changing economic and social conditions.<sup>42</sup> Although many countries, such as England, have codified laws regarding trusts to meet changing conditions with regard to business and property law, in the United States, only a handful of states have codified trust principles.<sup>43</sup> Further, states possess the authority to grant the right to receive property.<sup>44</sup> Each state has the power to choose how to regulate the transfer of property within its boundaries.<sup>45</sup>

Only some states have trust codes or statutes containing detailed rules that govern the creation and administration of trusts.<sup>46</sup> Most states'

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<sup>41</sup> BOGERT & BOGERT, *supra* note 34, § 1. The American colonies adopted the English system of trusts. *Id.* For a list of twenty-eight early cases where a trust was discussed or construed in America in the late eighteenth century, see *id.*

<sup>42</sup> *Id.* To read articles that trace the developments made in trust law, see *Developments in the Law of Trusts*, 48 HARV. L. REV. 1162 (1935).

<sup>43</sup> BOGERT & BOGERT, *supra* note 34, § 1. For example, England has codified a considerable amount of trust law since 1850, including the Judicial Trustee Act, the Public Trustee Act, the Perpetuities and Accumulations Act of 1964, and the Variation of Trusts Act. *Id.* Scotland, Canada, and Australia have also developed legislation regarding trust law that is similar to England. *Id.*; see also *infra* note 160.

<sup>44</sup> *Scholey v. Rew*, 90 U.S. 331, 335 (1874); *Hall v. Vallandingham*, 540 A.2d 1162, 1164 (Md. Ct. Spec. App. 1988) ("The right to receive property by devise or descent is not a natural right but a privilege granted by the State."); *Safe Deposit & Trust Co. v. Bouse*, 29 A.2d 906, 910 (Md. 1943).

<sup>45</sup> *Mager v. Grima* 49 U.S. 490 (1850); *Vallandingham*, 540 A.2d at 1164. The court stated:

Every State possesses the power to regulate the manner or term by which property within its dominion may be transmitted by will or inheritance and to prescribe who shall or shall not be capable of receiving that property. A State may deny the privilege altogether or may impose whatever restrictions or conditions upon the grant it deems appropriate.

*Vallandingham*, 540 A.2d at 1164.

<sup>46</sup> BOGERT & BOGERT, *supra* note 34, § 1. Leading the way in state codification of trust laws, New York and California were the first states that codified many trust principles. *Id.* § 1, at 29. In addition, some other states, such as Georgia, Indiana, Louisiana, Maryland, Oklahoma, and Pennsylvania, have trust codes or statutes containing detailed rules that govern the creation and administration of trusts. *Id.* Texas has also joined the group of states that have provisions that are related to trust laws in its Trust Act, which was consolidated into its Property Code in 1984. *Id.* More recently, Washington, Montana, Michigan, Arkansas, Missouri, and Iowa have adopted provisions that deal with trust law. *Id.* The state of New York's Estates, Powers, and Trusts Law, which took effect in 1967, codified in one chapter all statutes covering the substantive law of estates and trusts,

statutes regarding trust laws are incomplete and govern only limited aspects of trusts.<sup>47</sup> Although many provisions of Article VII of the Uniform Probate Code have been adopted by a number of states in some form, the concept of trust regulation is a novel concept.<sup>48</sup> Specifically, in states where trusts are not subject to statutory regulation or direct judicial supervision, concern may exist that the registration and permissive court proceedings provided in Article VII will lead to additional litigation and tying up of the courts.<sup>49</sup> Individuals increasingly utilize the freedom states allow in drafting trusts by adding incentive conditions to manipulate the behavior of their beneficiaries, which typically include family members.<sup>50</sup>

### C. *Incentive Conditions*

In today's society, many wealthy individuals strategize about distributing their possessions.<sup>51</sup> Often, people are more concerned with

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including powers and regulations of fiduciaries' activities. *Id.* In 1987, California enacted Cal.Stats.1986, c. 820, a Trust Law, as part of the California Probate Code. *Id.* Also, Montana adopted a new trust code in 1989 that was patterned after the California Probate Code. *Id.*

<sup>47</sup> *Id.* § 1, at 34. These undeveloped statutes merely guide the creation of trusts and steer the trustee in carrying out his administration duties. *Id.* § 1, at 35. Many times, the provision applies only where the settlor has not otherwise provided in a trust himself. *Id.* One example includes legislation establishing authorized trust investments, which grants broad powers to trustees and sets forth rules as to trust accountings and trustee compensation. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* Specifically, Indiana, a state with more developed trust laws, has statutes concerning certain types of provisions that are void because the provisions are against public policy. *Id.* According to Indiana law regarding restraint of marriage, "[a] devise to a spouse with a condition in restraint of marriage shall stand, but the condition shall be void." IND. CODE § 29-1-6-3 (2004).

<sup>50</sup> See *infra* Part II.C.

<sup>51</sup> James Edward Harris, *Level Five Philanthropy: Designing a Plan for Strategic, Effective, Efficient Giving*, 26 U. ARK. LITTLE ROCK L. REV. 19, 20 (1999) (quoting *Doing Well By Doing Good, Improving Client Service Increases Philanthropic Capital: The Legal and Financial Advisors Role*, 2000 THE PHILANTHROPIC INITIATIVE, INC. 9). Most of those interested in the incentive trusts have also made their fortunes in recent years and have a negative bias against inherited wealth. Monica Langley & Ricardo Gandara, *You Worked to Earn Your Millions, but Will Your Kids be Spoiled Trust*, AUSTIN AM.—STATESMAN, Jan. 8, 2000, at D1. The concept is proving enormously popular as a form of "financial parenting," as well as a good way to avoid estate taxes. *Id.* Atlanta Braves star pitcher, Tom Glavine, who has an annual salary of eight million dollars, has created a family incentive trust for his children. Monica Langley, *Trust Me Baby: The House, the Money, It'll All Be Yours; There's Just One Thing*, WALL ST. J., Nov. 17, 1999, at A1. Glavine's trust provides that the trust will match the income the children earn up to \$100,000. *Id.* Glavine also intends to encourage his family, through trust money, to play sports, set up a veterinary practice (or other business), stay at home with their kids, and do well in school. *Id.*

keeping their heirs in line rather than avoiding probate and minimizing their taxes.<sup>52</sup> An emerging central goal of estate planning is to protect and preserve the family's values, as opposed to the goal of protecting and preserving the family's assets.<sup>53</sup> Wealth transmission formerly centered on birthright, but now wealth transmission centers on the investment of skills or values.<sup>54</sup> Therefore, when a property owner is primarily concerned with preserving values, he will create an incentive condition regarding his expectations of his offspring's conduct, his belief about marriage or divorce, or his desire for charitable behavior.<sup>55</sup>

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<sup>52</sup> Whiting, *supra* note 4, at 6. The most pressing issues among wealthy people today are protecting the family wealth and encouraging productivity. *Id.* The top 0.5% of wealthy Americans were concerned that their heirs would be materialistic or naïve about money, according to a recent survey by U.S. Trust. *Id.* Warren Buffett was quoted saying that "the perfect inheritance is enough money so that they feel they can do anything, but not so much that they could do nothing." *Id.* In addition, absent a legislative change of the Internal Revenue Code, the estate tax exemption will disappear in 2010. 26 U.S.C.A. § 2001.

<sup>53</sup> John. J. Scroggin, *Restraining an Inheritance Can Accomplish a Client's Objectives*, 30 EST. PLAN. 124, 124 (2003). Property owners are sometimes unwilling to give large inheritances to beneficiaries because they fear that they have failed to teach their children financial responsibility. *Id.*

<sup>54</sup> John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988). Items of patrimony include the family farm or firm and the ability to rescue a beneficiary from the harsh fate of being a mere laborer. *Id.* As a consequence of the new trend to transfer money to invest in skills, transfers occur during the life of the beneficiaries rather than at the death of the benefactor. *Id.* Further, children get financial help from their parents today during their lifetimes for expenses such as education, but they do not depend on any inheritance. *Id.* People are also living longer and their parents do not pass away until they are at least middle aged so children do not depend on an inheritance for support. *Id.*

<sup>55</sup> Scroggin, *supra* note 53, at 124. In each of the circumstances, some form of restrained inheritance exists. *Id.* In particular, one strategy aimed to pass along values in addition to wealth is to initiate incentive conditions in a trust. Hickok, *supra* note 4, at 17. Any properly drafted trust, i.e., life insurance trust, credit shelter trust, dynasty or generation skipping trust, revocable trust, or charitable trust, is acceptable to contain an incentive condition. Whiting, *supra* note 4, at 6. In addition, according to Harris:

A growing body of literature encourages people to identify their basic values and to write a personal mission statement: a clear, concise declaration of their purpose in life and what they hope to accomplish with it. Two best sellers that advocate this are *The Seven Habits of Highly Effective People*, by Stephen Covey, and *What Color is Your Parachute*, by Richard Bolles. Covey develops a personal planning system that applies values and mission to the various roles in life and develops goals for each role. Bolles combines those ideas with the concept of discovering one's unique skills and interests to land the job of one's dreams.

Harris, *supra* note 51, at 21-22. When a property owner is primarily concerned with preserving his values, the plan initially concentrates on non-tax issues such as incentive

An incentive condition is a type of condition precedent or condition subsequent that allows an heir to inherit only if he has behaved in a desired way described in the trust.<sup>56</sup> The ability to devise individually tailored conditions that are effective beyond one's lifetime has made the trust a treasured device, making creatively devised incentive conditions a new trend of the millennium.<sup>57</sup> Examples of encouraged behavior

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conditions. Scroggin, *supra* note 53, at 124. Providing examples of the possible non-tax incentives in a trust, Scroggin lists:

[T]aking into account the offspring, marriage, personality, and character of each child. Focusing on difficult family issues (e.g., the expectation of divorce). Minimizing the sources of potential family conflicts (e.g., personal property dispositions). Creating opportunities and incentives for heirs, without supporting an unearned lifestyle. Assisting the client's desire to pass on productive values to future generations. Encouraging charitable involvement. Placing reasonable, flexible restraints on inherited wealth. Building balance and flexibility into the plan to permit modifications in the future.

*Id.*

<sup>56</sup> Hickok, *supra* note 4, at 17. A condition is "[a] stipulation or prerequisite in a contract, will, or other instrument, constituting the essence of the instrument." BLACK'S LAW DICTIONARY 312 (8th ed. 2004). Further, a condition precedent is defined as:

An act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered. The most common condition contemplated by this phrase is the immediate or unconditional duty of performance by a promisor.

*Id.* A condition subsequent is "[a] condition that, if it occurs, will bring something else to an end; an event the existence of which, by agreement of the parties, discharges a duty of performance that has arisen." *Id.* For example, Microsoft millionaire, Greg Tracy has written in his children's trust that the children must "demonstrate financial responsibility, gainful employment and lack of harmful dependencies." Langley, *supra* note 51, at D1. If the child is getting an education or working, the trust can make liberal distributions. *Id.* However, the distributions are cut off if the child is on drugs, abusing alcohol, or in a cult. *Id.* In summary, incentive trusts are intended to motivate or discourage particular conduct by the beneficiary. Financial Planning Ass'n, *The Pros and Cons of Incentive Trusts* (2001), available at <http://www.bevbank.com/library/0101/>. For example, an incentive condition providing that a beneficiary receive money from a trust only if he does not harass another beneficiary discourages the particular behavior of harassing the other beneficiaries for money. See *infra* notes 89-95 and accompanying text.

<sup>57</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (2003). The Restatement states:

The private trust is tolerated, even treasured, in the common-law world for the flexibility it offers to property owners in planning and designing diverse beneficial interests and financial protections over time, individually tailored as the particular property owner deems best to the varied needs, abilities, and circumstances of particular family members and others whom the owner chooses to benefit.

*Id.* In order to pass along values, as well as money, creatively devising incentive conditions has become a new trend for the millennium. Langley, *supra* note 51, at A1. Langley's article quotes Rodney Owens, an attorney whose clients are incorporating incentives and

depicted in an incentive condition include obtaining an education or post-graduate degree, showing a good work ethic, demonstrating stewardship, or engaging in philanthropic behavior.<sup>58</sup> Other goals include, but are not limited to, benevolence, missionary work, marriage, and saving for retirement.<sup>59</sup> Many property owners wish to discourage other behavior, such as squandering, consumption, laziness, or any illegal activity.<sup>60</sup> Not only are there many different values that property owners desire, there are also many different conditions property owners establish in order to accomplish their desires.<sup>61</sup>

Upon examining the history of incentive conditions, it is apparent that wealthy parents have historically attached conditions to the passing of their fortunes.<sup>62</sup> One of the oldest and most common conditions involved an age requirement, where a beneficiary received wealth only

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disincentives into their estate plans. *Id.* Many of his clients' trusts deny payments if, for example, children do not set up a prenuptial agreement or if they fail a drug test. *Id.* The trusts also reward charitable work or participation in family foundations. *Id.*

<sup>58</sup> Wells, Marble & Hurst PLLC, *Incentive Trusts: An Idea Whose Time has Come (and Gone?)* (2004), available at <http://www.wellsmar.com/CM/NewsandArticles/NewsandArticles42.asp>. Individuals use incentive conditions by distributing wealth based on a beneficiary earning a certain degree, maintaining a stated grade point average, or attending a particular school. Clark Hill PLC, *Use Incentive Trusts to Reinforce Values* (2002), available at [http://www.clarkhill.com/law\\_media/IEP2002-06.pdf#search=incentive%20trusts](http://www.clarkhill.com/law_media/IEP2002-06.pdf#search=incentive%20trusts). For example, a beneficiary may discover that he is entitled to one million dollars from his uncle if and only if he gets a bachelor's degree. *Id.*

<sup>59</sup> Wells, Marble & Hurst PLLC, *supra* note 58; Clark Hill PLC, *supra* note 58. An incentive condition may encourage community involvement or volunteerism by stating that the trust will match any donations given by the beneficiary. Clark Hill PLC, *supra* note 58. The trust may also distribute funds in the trust if the beneficiary pursues a low-income career, such as teaching, social work, or a religious career. *Id.* Provisions may also allow for the distribution of money to a beneficiary who takes an active role in the family's philanthropic movement. *Id.*

<sup>60</sup> Wells, Marble & Hurst PLLC, *supra* note 58; Clark Hill PLC, *supra* note 58. Commonly, individuals will design incentive conditions around the beneficiary's choices regarding the beneficiary's health. Clark Hill PLC, *supra* note 58. For instance, a condition may state that the beneficiary may not drink, smoke, or do drugs, and the trust may state that the beneficiary must maintain a certain weight. *Id.*

<sup>61</sup> Wells, Marble & Hurst PLLC, *supra* note 58.

<sup>62</sup> Langley, *supra* note 51, at A1. What is new in the incentive approach is the wide-ranging and highly specific nature of the parental conditions. Langley & Gandara, *supra* note 51, at D1. Parents are often picking incentives that correlate to strikingly idiosyncratic concerns. *Id.* "The only limit is the imagination," according to one attorney. *Id.* Parents are planning conditions that involve the chances of the beneficiary becoming legally incapacitated due to a physical or mental disability. Wells, Marble & Hurst PLLC, *supra* note 58. The beneficiary may be a spendthrift, chemically dependent, easily influenced, or consistently make bad choices regarding such things as marriage partners and financial matters. *Id.*

when the beneficiary reached a named age in the trust or will.<sup>63</sup> For example, in *Webster v. Morris*,<sup>64</sup> the testator provided that an executor must keep the principal sum of the value of an estate given to the testator's grandson in a trust until the grandson reached thirty years of age.<sup>65</sup> The condition was set so that the child could mature and know how to handle financial matters in an appropriate way.<sup>66</sup> The Supreme Court of Wisconsin allowed the condition and stated that everyone has a legal right to transfer his property as he sees fit.<sup>67</sup> Another long-standing and popular example of a condition in a trust is where an inheritance is

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<sup>63</sup> Financial Planning Ass'n, *supra* note 56. This type of trust is also called a delayed distribution. Wells, Marble & Hurst PLLC, *supra* note 58. According to Harris:

The practice of creating a lasting expression of one's most deeply held values is not new. Examples of the ancient custom of "ethical wills," statements intended to pass along values and beliefs to succeeding generations, can be found among the Old Testament patriarchs. First handed down in oral tradition and later reduced to writing, ethical wills at one point became as common as attachments to legal wills. Dr. Barry Baines, the leading advocate for ethical wills today, uses this comparison: "Legal wills bequeath valuables, while ethical wills bequeath values."

Harris, *supra* note 51, at 22.

<sup>64</sup> 28 N.W. 353 (Wis. 1886). In this case, a father's will conditioned his grandson's inheritance on the grandson reaching thirty years of age. *Id.* at 360. In addition, the property was conditioned on the grandson being mature, as determined by the trustee. *Id.* The court ruled that the condition was valid and did not violate public policy because people can transfer their property as they see fit. *Id.*

<sup>65</sup> *Id.* at 355. Specifically, the part of the will that stipulated that the grandson will receive the principal of the money only when he reached the age of thirty stated:

I give . . . my grandson . . . the sum of ten thousand dollars; said sum to be invested and put to use, and the interest arising therefrom, or so much as said child's guardian and my executors, hereinafter mentioned, may consider proper and necessary, be used for the support and education of said child, and at his majority the unexpended interest from said principal sum be paid him, and the interest on said sum annually thereafter until he arrives at the age of thirty years, at which time I will and direct that my executors pay to said Edward Morris one half of said ten thousand dollars, and one thousand dollars each year thereafter, together with all interest earned, until the balance of said ten thousand dollars hereby willed to him has been paid: provided, however, that said Edward Morris has in the mean time learned some useful trade, business, or profession, and is of good moral character, my executors to determine whether said child has fully complied with said proviso before any payments from the principal sum are made to him.

*Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 360. The court further stated that the age restriction was also reasonable and the other requirements stated in the condition were capable of performance by any person of ordinary intelligence. *Id.* at 362.

given in installments so that the beneficiary can learn how to handle money in increments along the way.<sup>68</sup>

Today, many individuals exercise a great deal of freedom in selecting and describing behavioral incentives in their trusts.<sup>69</sup> Although most states have not specifically addressed the issue of policing the freedom of incentive conditions, the *Restatement (Third) of Trusts* sets forth guidelines in evaluating the validity of a given condition.<sup>70</sup>

D. *The Restatement's Treatment of Incentive Conditions*

The *Restatement (Third) of Trusts* addresses the requirements and validity of incentive conditions.<sup>71</sup> In order to allow and limit the use of trusts, the Restatement has proposed three conditions that, if not fully satisfied, will invalidate an incentive condition.<sup>72</sup> According to Restatement section 29, a trust or provision in a trust is invalid if it requires the beneficiary to commit a criminal or tortious act, if it violates the applicable Rule Against Perpetuities, or if it is against public policy.<sup>73</sup> In the instance that one of the three situations in section 29 is present in a

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<sup>68</sup> Financial Planning Ass'n, *supra* note 56. An example of a trust with installment payments is when an individual makes a trust where the beneficiary is to receive a certain amount of money when the individual turns eighteen, twenty, twenty-five, and the remainder when he turns thirty.

<sup>69</sup> Langley & Gandara, *supra* note 51, at D1. One attorney has described the incentive condition by saying that the only limit of the provisions is the imagination. *Id.*

<sup>70</sup> See *infra* Part II.D.

<sup>71</sup> See *infra* Part II.D.

<sup>72</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (2003). Specifically, the Restatement reads: "An intended trust or trust provision is invalid if: (a) its purpose is unlawful or its performance calls for the commission of a criminal or tortious act; (b) it violates rules relating to perpetuities; or (c) it is contrary to public policy." *Id.*

<sup>73</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 (2003). Regarding the Rule Against Perpetuities: The fundamental policy assumption of the Rule against Perpetuities is that vested interests are not objectionable, but contingent interests are. The Rule against Perpetuities limits the time during which property can be made subject to contingent interests to "lives in being plus 21 years." . . . The Rule has two basic purposes: (1) to keep property marketable and available for productive development in accordance with market demands; and (2) to limit "dead hand" control over the property, which prevents the current owners from using the property to respond to present needs. The second purpose is implemented by curbing trusts, which, after a period of time and change in circumstances, tie up the family in disadvantageous and undesirable arrangements, leaving the beneficiaries unable to meet current newly arising exigencies. In addition, if not limited in their duration, trusts would tend to create a permanent class of rich families, whose wealth would not depend on their abilities.

DUKEMINIER & JOHANSON, *supra* note 27.

trust, the validity of the trust as a whole depends on whether the unlawful provision can be appropriately modified or separated from the other provisions without defeating the testator's intent.<sup>74</sup>

Examining the provisions in section 29, the first two clauses can be easily interpreted and are less objective than the third clause regarding public policy, which can be interpreted differently by different courts.<sup>75</sup>

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<sup>74</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. c (2003).

<sup>75</sup> *Id.* § 29 cmt. i. Clause (a) addresses situations that involve impermissible purposes or provisions of the trust itself. *Id.* § 29 cmt. b. In general, if a trust provision requires the commission of a criminal or tortious act by the trustee, the provision is invalid. *Id.* § 29 cmt. c. For example:

[W]here several persons establish a fund to be held in trust for the purpose of securing, through bribery, legislation or administrative action favorable to their business activities, the intended trust is unenforceable. Similarly, an intended trust or provision to participate in an unlawful business, such as the marketing of legally prohibited substances or the unlicensed practice of medicine or law, is unenforceable; and a direction to operate a factory on certain land is unenforceable if the factory operation would be a tortious nuisance to the owners of adjoining lots or would be in violation of environmental law.

*Id.* Public policy also forbids trust provisions that tend to undermine proper administration of trusts. *Id.* § 29 cmts. f, i. Further, a trust incentive provision may be invalid because the purpose that provision serves is fraudulent or unlawful or if the provision is included for an unlawful consideration. *Id.* § 29 cmt. d.

For example, the owner of property might transfer it to another who agrees to hold it in trust for the transferor or another with the purpose being to conceal the interest of the transferor or other person, not merely for reasons of privacy but in order to mislead the government or others with respect to the true beneficial interests in the property. Such a case may arise where a person pays money to another pursuant to an oral agreement that the funds will be held in trust for the payor and returned upon demand, intentionally creating a deceptive appearance of ownership in the payee and thereby inducing a third person to make a loan to the payee. Or a person may purchase land or securities and, for the purpose of defrauding creditors or of evading a prohibition or limitation in a statute, have title placed in the name of another, who agrees to hold the property upon a trust for the purchaser.

*Id.* In addition, clause (b) is also less objective in nature because it suggests that a trust provision must not violate a state's Rule Against Perpetuities. *Id.* § 29 cmt. e. According to this rule, a condition in a trust automatically fails if the trust does not have at least one definite beneficiary or does not describe at least one potential beneficiary within the requirements of the rule against perpetuities. *Id.* § 29 cmt. g. The Restatement specifically states that "a private trust fails unless the trust has one or more definite beneficiaries or provides for one or more beneficiaries to be ascertained within the requirements of the applicable rule against perpetuities." *Id.* Further, according to the Restatement's proposed Rule Against Perpetuities, "[t]he period of the rule against perpetuities in donative

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Public policy concerns arise, for example, in provisions that interfere with the beneficiary's freedom to marry or religious freedom.<sup>76</sup> These examples are not the only incentive conditions that will invalidate a trust provision.<sup>77</sup> According to the comments of the Restatement, the third clause of public policy is usually associated with dead-hand control.<sup>78</sup> The goal of the clause is to reflect a compromise between the free disposition of privately owned property and other social values.<sup>79</sup> Although an individual is free to give to or withhold property from another during his lifetime, it does not follow that the individual can attach whatever terms or conditions he chooses to a trust.<sup>80</sup> However, neither simple nor precise rules of validity or invalidity exist when applying the rule that an incentive condition must not violate public policy.<sup>81</sup>

Regarding the public policy of promoting personal habits, the Restatement provides that a provision in an otherwise effective transfer is generally valid when the provision is aimed at preventing the acquisition or retention of a property interest based on a specific beneficiary's personal habit.<sup>82</sup> The Restatement also takes the position

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transfers is 21 years after lives in being (the measuring lives) at the time the period of the rule begins to run." RESTATEMENT (SECOND) OF DONATIVE TRANSFERS § 1.1 (1983).

<sup>76</sup> Wells, Marble & Hurst PLLC, *supra* note 58. Examples of provisions relating to marriage that may violate public policy pertain to limiting the selection of a spouse or unduly postponing marriage. *Id.*

<sup>77</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. a (2003). Other examples of ways to invalidate a trust include an illegal or unethical act of the trustee, a beneficiary, or a third person. BOGERT & BOGERT, *supra* note 34, § 44. Examples of invalidating causes that are connected to the creation of a trust include cases of misrepresentation of fact, undue influence, duress, and mistake. *Id.* For example, a court held that a trust was invalid when beneficiaries made false statements to a settlor about the status of a person claiming to be the settlor's son and influenced the settlor to exclude his real son. *Kinney v. St. Louis Trust Co.*, 143 S.W.2d 250 (Mo. 1940). According to the Restatement, "[a] transfer in trust or declaration of trust can be set aside, or the terms of a trust can be reformed, upon the same grounds as those upon which a transfer of property not in trust can be set aside or reformed." RESTATEMENT (THIRD) OF TRUSTS § 12 (2003).

<sup>78</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (2003). Dead-hand control is where the person who gave his money away makes provisions in his trust that enables him to control the actions of another even after he has passed away. *Id.*; see *infra* note 197 and accompanying text.

<sup>79</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (2003). The Restatement recognizes that the balance between free disposition of private property and social values may create a burden on the courts to interpret and enforce the interests and conditions of the deceased individual. *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> RESTATEMENT (SECOND) OF PROP. § 8.2 (1983). Specifically, "[a]n otherwise effective provision in a donative transfer which is designed to prevent the acquisition or retention of

that using restraints to induce or eliminate personal habits is not against public policy.<sup>83</sup> However, a closer look at specific cases illustrates the difficulty in allowing any promotion or restraint on a personal habit.<sup>84</sup>

*E. Case and Individual Treatment of Incentive Conditions*

Traditionally, courts have upheld family incentive conditions written to promote or restrain a beneficiary's personal conduct unless the conditions violated public policy.<sup>85</sup> However, various court interpretations and applications of whether a condition violates public policy have led to conflict and confusion.<sup>86</sup> The case law in this Part discusses generally acceptable and unacceptable conditions regarding the validity of family incentive trusts involving in terrorem provisions, marriage, family relationships, religion, and the condition's language.<sup>87</sup>

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an interest in property on account of the transferee acquiring or persisting in specified personal habits is valid." *Id.* Personal habits can, for example, relate to the beneficiary's health by conditioning wealth on a beneficiary not smoking. *Clark Hill PLC, supra* note 58.

<sup>83</sup> *Id.* For instance, while a testator may attach conditions on a beneficiary's choice of religion, generally a testator cannot attach a restraint on a beneficiary's right to marry. *See infra* Parts II.E.2-3.

<sup>84</sup> *See infra* Part II.E.

<sup>85</sup> Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1276 (1999). Also, the Restatement sets forth the idea that incentive conditions pertaining to control personal conduct is valid unless it is against public policy or violates another law. RESTATEMENT (SECOND) OF PROP. § 5.1 (1983). The Restatement provides that "[u]nless contrary to public policy or violative of some rule of law, a provision . . . designed to prevent the acquisition or retention of an interest in property in the event of any failure on the part of the transferee to comply with a restraint on personal conduct is valid." *Id.* A trust or a provision in the terms of a trust is invalid if its enforcement would be against public policy, even though its performance does not involve the commission of a criminal or tortious act by the trustee. RESTATEMENT (SECOND) OF TRUSTS § 62 (1959); Sherman, *supra*, at 1277 (quoting *Lewis v. Searles*, 452 S.W.2d 153 (Mo. 1970)).

<sup>86</sup> *See infra* note 109 and accompanying text.

<sup>87</sup> *See infra* Parts II.E.1-3.

1. In Terrorem Provisions

“In terrorem” is defined as “by way of threat; as a warning.”<sup>88</sup> For example, in *Estate of Lewis*,<sup>89</sup> the court examined the validity of an “anti-harassment clause,” where a settlor depicted in her trust that one trustee was to determine if another had harassed him concerning matters related to the money in the trust.<sup>90</sup> If the first trustee reported that the second trustee had harassed him, the first trustee was entitled to the second trustee’s share.<sup>91</sup> One of the beneficiaries objected to the anti-harassment clause, claiming that it was an incentive condition that was against public policy, and thus it was unenforceable.<sup>92</sup> He stated that the clause subjected him to an arbitrary and capricious withholding of life-sustaining funds, allowed the beneficiaries to concoct a story that would suspend his payments, and gave the trustees the loose right to determine

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<sup>88</sup> BLACK’S LAW DICTIONARY 839 (8th ed. 1999). In addition, “in terrorem” has been defined as “[i]n terror, or warning; by way of threat.” *U.S. Nat’l Bank of Portland v. Snodgrass*, 275 P.2d 860, 871 (Or. 1954). “The term is applied to gifts or legacies given on conditions subsequent, because it is said that the possibility of losing the gift tends to inspire fear or dread.” *Id.*; see *infra* notes 115–18 and accompanying text. The term is derived from a Latin word meaning “in fear.” General Publ’g Group, Law.com Dictionary (2005), <http://dictionary.law.com/default2.asp?typed=in+terrorem&type=1&submit1.x=58&submit1.y=7>. Further, one dictionary defines “in terrorem” as:

[A] provision in a will which threatens that if anyone challenges the legality of the will or any part of it, then that person will be cut off or given only a dollar, instead of getting the full gift provided in the will. The clause is intended to discourage beneficiaries from causing a legal ruckus after the will writer is gone.

*Id.*

<sup>89</sup> 770 A.2d 619 (Me. 2001). In this case, the court ruled that the anti-harassment condition was valid at the time of the decision because the issue was not yet ripe. *Id.* at 624.

<sup>90</sup> *Id.* at 619. The settlor in *Lewis* was survived by three sons, David, Paul, and the contestant, Lawrence. *Id.* at 621. In addition to representing the testatrix, the attorney also represented the settlor’s son, David, in estate planning matters and had prepared a will and trust for Lawrence in 1972. *Id.* After the death of the testatrix, her sons, David and Paul, and the attorney were informally appointed as personal representatives of the estate. *Id.* Lawrence also claimed that the attorney’s dual representation created undue influence. *Id.* The anti-harassment clause in Ms. Lewis’ will provided:

Provided however, that the Trustees may, in their sole and absolute discretion, suspend making any and all payments to or for the benefit of LAWRENCE LEWIS at any time when in the judgment of the Trustees, LAWRENCE LEWIS is harassing any beneficiary or any Trustee, or their agents, of any trust created hereunder.

*Id.* at 622–23.

<sup>91</sup> *Id.* at 619.

<sup>92</sup> *Id.* at 622–23. Lawrence objected to the clause when the personal representatives filed for formal probate of the will and formal appointment of personal representatives. *Id.*

harassment.<sup>93</sup> The Supreme Court of Maine stated that the clause was not against public policy, as of yet.<sup>94</sup> The court held that the clause was valid because the in terrorem provision issue depended on possible future facts that did not exist at that time.<sup>95</sup>

While the court in Maine left the clause open to future litigation based on ripeness, other states, such as Indiana, bar in terrorem clauses altogether.<sup>96</sup> In addition, particular conditions that contain restraints on marriage are usually considered in terrorem, forcing courts to determine the validity of the conditions.<sup>97</sup>

## 2. Marriage and Family Relationships

An individual may also attempt to condition the amount of money that a beneficiary receives on the beneficiary's marital and family

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<sup>93</sup> *Id.* at 623. Compare *Webster v. Morris*, 28 N.W. 353, 361 (Wis. 1886) (holding the clause requiring the beneficiary to reach thirty years of age and be mature was in terrorem and against public policy), with *Estate of Lewis*, 770 A.2d 619, 624 (Me. 2001) (holding that a clause requiring the beneficiary to not harass other potential beneficiaries was valid).

<sup>94</sup> *Estate of Lewis*, 770 A.2d at 624. The probate court declined to determine that the anti-harassment clause in the trust was, as a matter of law, against public policy and thus unenforceable. *Id.* at 623. The probate court declined to find any undue influence regarding the attorney's dual representation of Ms. Lewis and David because undue influence requires more proof than what Lawrence provided. *Id.* at 622. The court stated its intention to leave open the question as to future enforceability of the anti-harassment clause and awarded Lawrence attorney fees on the basis of probable cause. *Id.* at 621. On appeal, the beneficiary challenged the court's decision not to strike the anti-harassment clause. *Id.* at 624. Lawrence also challenged the probate court's decision regarding undue influence, and the Supreme Court of Maine upheld the probate court's decision, reasoning that there was no undue influence. *Id.* The personal representatives filed a cross-appeal, challenging the court's statement on an unripe issue of future litigation over the anti-harassment clause and the court's award of attorney fees to Lawrence. *Id.* at 621, 624.

<sup>95</sup> *Id.* at 624. Further, the Supreme Court of Maine upheld the award of attorney fees to Lawrence because his claims were made in good faith. *Id.* at 625.

<sup>96</sup> IND. CODE § 29-1-6-2 (2004). Specifically, the statute states:

If, in any will admitted to probate in any of the courts of this state, there is a provision or provisions providing that if any beneficiary thereunder shall take any proceeding to contest such will or to prevent the admission thereof to probate, or provisions to that effect, such beneficiary shall thereby forfeit any benefit which said will made for said beneficiary, such provision or provisions shall be void and of no force or effect.

*Id.*

<sup>97</sup> *U.S. Nat'l Bank of Portland v. Snodgrass*, 275 P.2d 860, 871 (Or. 1954). According to the court, it is the absence of a gift that determines whether a condition is a threat under the in terrorem rule, making the condition invalid. *Id.*; see also *infra* Part II.E.2.

relationships.<sup>98</sup> A provision of a will or a trust is usually invalid if it tends to encourage disruption or formation of a family relationship.<sup>99</sup> Some courts have invalidated discriminatory regulations, such as a condition that an individual must marry someone of a particular racial, ethnic, or religious background.<sup>100</sup>

As a general rule, conditions pertaining to family relationships are invalid.<sup>101</sup> In *Maddox v. Maddox*,<sup>102</sup> a provision in a will allowed an inheritance to go to a woman only if she married one of six men.<sup>103</sup> The Virginia Supreme Court held that the condition was void as an unreasonable restraint on marriage.<sup>104</sup>

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<sup>98</sup> See *infra* notes 101-14 and accompanying text (describing various court cases involving restraints on marriage).

<sup>99</sup> See RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i (2003); see also *infra* notes 101-14 and accompanying text. Exceptions to the rule exist. See *infra* notes 106-09 and accompanying text. Regarding what is left of a trust after an individual provision is held invalid, the Restatement gives both the courts and the trustees the power to eliminate provisions at their discretion. RESTATEMENT (THIRD) OF TRUSTS § 66 (2003). According to the Restatement:

- (1) The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.
- (2) If a trustee knows or should know of circumstances that justify judicial action under Subsection (1) with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust.

*Id.*

<sup>100</sup> *Hickok*, *supra* note 4, at 17; see, e.g., IND. CODE § 29-1-6-2 (2004) (stating that a provision in a will or trust that puts a restraint on marriage is acceptable, but the actual condition is void). A will in which a husband gave his wife land containing the restriction that the wife remained a widow was not a restraint on marriage because the condition contained only words of limitation. *Summit v. Yount*, 9 N.E. 582, 582-84 (Ind. 1886). Compare *Crawford v. Thompson*, 91 Ind. 266, 277 (1883) (holding invalid a provision in a will stating that a girl will not get an annual amount of money set aside for her if she married a second time), with *Summit*, 9 N.E. at 582-84 (holding valid a provision in a will that limited a beneficiary's inheritance on her not marrying).

<sup>101</sup> See *infra* notes 109-14 and accompanying text.

<sup>102</sup> 52 Va. 804 (1854). In this case, the Virginia Supreme Court found that a provision that restrained a daughter's choice of spouses to about six men was unreasonable and void. *Id.* at 808-09.

<sup>103</sup> *Id.* at 805. In this case, a father stated in his will that the daughter would get the remainder of his estate as long as she remained a member of a certain society. *Id.* Once she married a man who was not a member of the society, it was the society's rule to not allow the daughter to be in the society, and thus the daughter could not meet the condition. *Id.*

<sup>104</sup> *Id.* at 808-09.

However, a valid exception to the rule is the termination of a spouse's interest in a testator's trust if the testator's spouse remarries.<sup>105</sup> In *Lewis v. Searles*,<sup>106</sup> a will contained a provision that disallowed giving property to the testator's spouse if she remarried.<sup>107</sup> The Missouri Supreme Court held that the provision was not against public policy because it did not punish the testator's spouse for marrying; rather, it was intended to aid the testator's spouse while single.<sup>108</sup> The court discussed the conflict and confusion surrounding the restraint of marriage, explaining that the general rule that a restraint on marriage was void against public policy had been "eaten out with exceptions."<sup>109</sup>

Most courts have held that a trust with a condition that the beneficiary divorce or separate from his or her spouse is against public policy and therefore invalid, but this principle is subject to certain

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<sup>105</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (2003).

<sup>106</sup> 452 S.W.2d 153 (Mo. 1970). In this case, a plaintiff sought to void a condition in a will that stated the plaintiff would get property only if she remained unmarried. *Id.* at 154. The court ruled that the condition was valid because it was intended not to punish but to aid the plaintiff while single. *Id.* at 159.

<sup>107</sup> *Id.* at 154. Specifically, the will stated:

I devise to my niece, Hattie L. Lewis, all of my real and personal property of which I may die seized and possessed, so long as she remains single and unmarried. In the event that the said Hattie L. Lewis shall marry, then and in this event I desire that all of my property, both real and personal be divided equally between my nieces and nephews as follows, to the said Hattie L. Lewis, an undivided one third, to Letitia A. LaForge, wife of A. C. LaForge, an undivided one third, and to James R. Lewis an undivided one third.

*Id.*

<sup>108</sup> *Id.* at 159.

<sup>109</sup> *Id.* at 155. The court stated that modern opinion seems to be that the right of the donor to attach conditions pertaining to marriage will outweigh the maxim that marriage should be free, except where the conditions have no reasonable purpose. *Id.* Specifically, the court stated:

The history of this most ancient rule is discussed in that Annotation. It is obvious that the cases on the subject are both conflicting and confusing, but that most, if not all, courts still give lip service to the doctrine. The tendency, however, is to consider whether, under the circumstances, the provision serves a legitimate purpose. And one reason which the author mentions as most commonly applied is the desire to furnish support to the devisee while single. Much confusion has developed in attempts to determine whether such a provision, in any given case, is a limitation or a condition. It has been indicated that generally a devise which is to be reduced in the event of marriage is held to be a condition subsequent.

*Id.*

exceptions and qualifications.<sup>110</sup> For example, the Alabama Supreme Court, in *Brizendine v. American Trust & Savings Bank*,<sup>111</sup> held that a condition precedent regarding the real estate of the testatrix given to her son was void.<sup>112</sup> The condition required that he give up living with, or having anything to do with, a named woman to whom he legally married three months before the execution of the will.<sup>113</sup> The court found it evident that the testatrix intended to bring about a separation or divorce between her son and his wife, concluding that the condition was void against public policy.<sup>114</sup>

In contrast, in *United States National Bank of Portland v. Snodgrass*<sup>115</sup> the Oregon Supreme Court held that a condition in a trust providing that the testator's daughter was to receive a certain sum if she proved to the satisfaction of the trustee that she had not embraced the Catholic faith or married a man of that faith was valid.<sup>116</sup> The court reasoned that an

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<sup>110</sup> J.F. Ghent, Annotation, *Wills: Validity of Condition of Gift Depending on Divorce or Separation*, 14 A.L.R.3d 1219, (1967). An example of an exception is support for female recipients.

<sup>111</sup> 101 So. 618 (Ala. 1924). The court ruled that a condition requiring a son to not associate with his wife was void because it was against public policy. *Id.* at 622.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 619. Specifically, the will stated:

The other half of my real estate I will bequeath to my own son, Frank L. Brizendine, provided he will reform, and give up living with, or having anything to do with this Mrs. Moore by name, whom he now lives with, and who alienated Frank's affections from his legitimate wife and son Frank Brizendine, Jr., and he, Frank Brizendine, shall not have a dollar of my real estate, unless he forsakes her (Mrs. Moore) and has nothing to do with her for a period of seven years, and proves that he has given her, Mrs. Moore, up.

*Id.* at 618.

<sup>114</sup> *Id.* at 622.

<sup>115</sup> 275 P.2d 860 (Or. 1954). In this case, the Oregon Supreme Court held that a condition in a trust requiring that an individual neither embrace the Catholic faith nor marry someone who was Catholic was valid. *Id.* at 872.

<sup>116</sup> *Id.* Specifically, the will provided:

When my said daughter shall have attained the age of thirty-two years and upon my death, that is to say, when these two events occur, my trustee is authorized and directed to transfer, assign and/or pay over to my said daughter Merle the whole of the trust fund of Fifteen Thousand (\$ 15,000.00) Dollars, or the one-half (1/2) of the entire estate if sum is more than Thirty Thousand (\$ 30,000.00) Dollars, provided she shall have proved conclusively to my trustee and to its entire satisfaction that she has not embraced, nor become a member of, the Catholic faith nor ever married to a man of such faith. In the event my daughter predeceases me, or having survived me dies prior to attaining the age of thirty-two years or if living becomes ineligible to receive the trust fund then I direct the principal of such trust fund to be

individual has great freedom to dispose of his property before and after his death.<sup>117</sup> In addition to analyzing the marriage aspect of the condition, the court also analyzed and validated the condition pertaining to religion based on freedom of expression even though the daughter claimed that the incentive condition restricted her constitutional freedom of religion.<sup>118</sup>

### 3. Religion

The general rule regarding a testator's right to devise conditions relating to religious freedom is that individuals are free, during their lives, to promote their religious views among others.<sup>119</sup> The court in

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divided as follows: —In case either my wife or daughter forfeit their right to the trust fund, by death or otherwise, I want one or both of said funds divided between the following parties share and share alike

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*Id.* at 862. The lower court concluded that the conditions were valid. *Id.* The daughter appealed the lower court's ruling, arguing that the conditions were against public policy because she was denied property based solely on her marriage, for she did not herself become Catholic. *Id.*

<sup>117</sup> *Id.* at 864. Further, the court stated:

Two general and cardinal propositions give direction and limitation to our consideration. One is the traditionally great freedom that the law confers on the individual with respect to the disposition of his property, both before and after death. . . . The right of a testator to attach to a gift in his will any lawful terms he sees fit, no matter how whimsical or capricious, is widely, if not universally, recognized. Conditions which are regarded as contrary to law or public policy, which are impossible of performance, or which are too vague and uncertain in their phraseology to disclose the actual intention of the testator, will not, however, be enforced, although it is established that in considering any testamentary condition the court must indulge a presumption in favor of its validity. When questions arise as to conditions or provisions being void as being against the public good or against public policy, great caution is necessary in considering them; at different times very different views have been entertained as to what is injurious to the public.

*Id.* (citation omitted); *see also* Clayton's Estate, 13 Pa. D. & C. 413 (Pa. D. & C. 1930) (holding that a similar provision in the will was valid because, operating only on the choice of a wife, it was too remote to be regarded as coercive of religious faith).

<sup>118</sup> *Snodgrass*, 275 P.2d at 860–72; *see infra* Part II.E.3.

<sup>119</sup> *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 829 (Ohio Ct. App. 1974); *see* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. k (2003). In *Shapira*, a will contained a clause that conditioned a son's inheritance on his marriage to a Jewish girl whose parents were both Jewish. 315 N.E.2d at 826. The court ruled that the religious condition was valid because the testator was not enforcing religion on the son; rather, the will enforced a restriction upon the son's inheritance. *Id.* at 832. The court reasoned that the provision was not a full restraint on marriage or religion, and thus it was a reasonable restraint. *Id.* *But see* *Maddox v. Maddox*, 52 Va. 804 (1854) (voiding a provision in a will that allowed an

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*Snodgrass* reasoned that an individual has the power to completely disinherit someone and is not forced to give a reason for the disinheritance.<sup>120</sup> Although the court noted that it seemed harsh and cruel that a parent would disinherit his child in the manner used in this case, no court can interfere as long as the motive is not completely unreasonable.<sup>121</sup>

Similar to the opinion in *Snodgrass*, the Ohio Court of Common Pleas declared that a father may include a provision in his will that required his son to marry a Jewish woman with Jewish parents in order to receive his property in *Shapira v. Union National Bank*.<sup>122</sup> Further, the court in

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inheritance to go to a woman only if she married one of six named men). The court held that the condition was an unreasonable restraint on marriage. *Id.* at 805. Individuals may also create charitable trusts during their lifetime or at death to support a chosen religion. *Id.*; see also RESTATEMENT (THIRD) OF TRUSTS § 28 (2003) (“Charitable trust purposes include: (a) the relief of poverty; (b) the advancement of knowledge or education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; and (f) other purposes that are beneficial to the community.”).

<sup>120</sup> 275 P.2d at 865. Further, the court stated that the father could have given his wealth to an entity that would express adverse views of a particular religion for which he harbored ill feelings. *Id.* The court noted that the father has a unique right to freedom of expression, which has built our country. *Id.* at 864. Specifically, the court stated:

It is this unique right to freedom of expression, whether manifested in the political forum, the church chancel or other arenas of thought and action, that has not only contributed so much to the greatness of our country and has given it such a distinctive and distinguished place in the world family of nations but has given additional vitality and substance to our valued religious freedom. . . . The other [cardinal proposition] is that greater freedom, the freedom of opinion and right to expression in political and religious matters, together with the incidental and corollary right to implement the attainment of the ultimate and favored objectives of the religious teaching and social or political philosophy to which an individual subscribes. We do not intend to imply hereby that the right to devise or bequeath property is in any way dependent upon or related to the constitutional guarantees of freedom of speech.

*Id.*

<sup>121</sup> *Id.* at 865. The court stated:

[W]hile it seems harsh and cruel that a parent should disinherit one of his children and devise his property to others, or cut them all off and devise it to strangers, from some unworthy motive, yet so long as that motive, whether from pride or aversion or spite or prejudice, is not resolvable into mental perversion, no court can interfere.

*Id.* (citations omitted).

<sup>122</sup> 315 N.E.2d 825, 826 (Ohio Ct App. 1974). The son whose father’s will contained a provision that he must marry a Jewish woman argued that the provision was unreasonable and that the court should apply the *Maddox* court’s reasoning because he claimed that the number of eligible Jewish females in this country was a small minority of the population. *Id.* at 831. The court determined that the *Maddox* decision and reasoning should not carry

*Shapira* examined the apparent intent of the testator and stated that he unmistakably intended that his wealth be used to encourage the preservation of the Jewish faith and blood.<sup>123</sup> Thus, the court found that the purpose of the provision was not merely a negative provision aimed to punish the son for not meeting the condition, but was meant to help support the testator's religion.<sup>124</sup>

Yet, according to the Restatement, a trust provision is usually invalid if the provision creates financial pressure regarding the future religious choices of beneficiaries.<sup>125</sup> Examining a condition aimed to control an individual's religious conduct, the Supreme Court of Pennsylvania, in *Drace v. Klinedinst*<sup>126</sup> held that the disputed condition contained in the testator's will was against public policy, and thus it was invalid.<sup>127</sup> The court used Section III of the Pennsylvania Bill of Rights, which declares that no human authority can control or interfere with the rights of conscience, to aid in its decision.<sup>128</sup> The will provided that the heirs could keep the estate as long as they "remained faithful" to a particular religion, but if any of them forsook this religion, then the estate should pass to the children of the testator's son who "remain[ed] true" to this religion.<sup>129</sup> The children "remained faithful" for some time before

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over because, although the number of eligible Jewish women was a minority, the provision was not unreasonable to the point of the unreasonable provision in *Maddox*, where a girl had only a handful of men to marry. *Id.*

<sup>123</sup> *Id.* at 832. Further evidence of the father's goal to preserve the Jewish faith is that if his son did not meet the condition and the money did not go to his son, then the money would go to the State of Israel. *Id.* The court stated that whether the father's decision was wise was not for the court to determine, but the court had a duty to honor the testator's intention within the limitations of the law and public policy. *Id.* The court stated that "[t]he prerogative granted to a testator by the laws of this state to dispose of his estate according to his conscience is entitled to as much judicial protection and enforcement as the prerogative of a beneficiary to receive an inheritance." *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. k (2003). A trust condition offering a financial inducement to accept or reject a particular faith or set of beliefs about religion is usually invalid. *Id.*

<sup>126</sup> 118 A. 907 (Pa. 1922). The court held that a condition that required an individual "remain[] faithful" to a particular religion was against public policy and invalid. *Id.* at 908-09.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 908. The decedent devised three pieces of land to his son for the term of his natural life. *Id.* After the son's death, the land was to go to the children "provided they remained faithful to a particular religion; and, in case any of them forsook this religion, 'then and in that case, to the remaining children of my said son who remain true' to this religion." *Id.* If a child did not remain faithful, the child's interest would be forfeited and given to other named relatives. *Id.*

leaving that church and joining another.<sup>130</sup> The court reasoned that the enforcement of the forfeiture would be contrary to public policy.<sup>131</sup>

Fifty years later, the same Pennsylvania Supreme Court upheld a condition based on religion in *In re Estate of Laning*.<sup>132</sup> The court held that the provision requiring the plaintiffs to remain “members in good standing of the Presbyterian Church” was valid because the condition was not illegal, immoral, tortious, or productive of any social evil.<sup>133</sup> The court noted that there may have been an impact on freedom of religion, but the condition did not impose a loss on the heirs because they never had any claim upon the estate of the testatrix in the first place.<sup>134</sup> The court saw no basis upon which to deny the testatrix the power to distribute her property by stipulating that the heirs maintain good standing in the Presbyterian Church.<sup>135</sup>

The *Laning* court reconciled the decisions in *Laning* and *Drace* by explaining the difference between interpretations of the language in the conditions of the wills.<sup>136</sup> Enforcing the “remain true” condition in *Drace* would require a determination of the doctrines of that religion and an inquiry as to whether or not the heirs had in fact “remained true” to those doctrines.<sup>137</sup> The court reasoned that such questions are clearly improper for a civil court to determine.<sup>138</sup> Thus, in addition to looking at the validity of the condition itself, courts look to the language of the

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<sup>130</sup> *Id.* When the children sought to sell the property, the purchaser questioned the marketability of the title, fearing that a breach of the religious condition might have divested the children of title. *Id.*

<sup>131</sup> *Id.* at 909. Primarily, the court held that the language of the will was not sufficient to render defeasible the estate divested. *Id.* Even if the language would otherwise create a defeasible interest, the enforcement of the forfeiture would violate public policy of the state. *Id.*

<sup>132</sup> 339 A.2d 520 (Pa. 1975). In this case, the court ruled that a provision requiring an individual to be a member in good standing of a particular church was valid. *Id.* at 521, 524.

<sup>133</sup> *Id.* At 521. The trial court ruled in favor of appellees. *Id.* at 522. On appeal, the court reversed the trial court’s decision. *Id.* at 526.

<sup>134</sup> *Id.* at 526. The court noted that the only way the heirs had any initial interest in the estate was to successfully satisfy the conditions the testatrix had attached to the will. *Id.*

<sup>135</sup> *Id.* at 524.

<sup>136</sup> *Id.* at 522.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 523. Not only would the condition in *Drace* have required improper inquiries into the content of religious doctrine, but the evaluation would have been magnified by the need to probe into the beliefs of the heirs. *Id.*

condition and the standards by which to measure the behavior of an individual in order to determine the validity of an incentive condition.<sup>139</sup>

#### 4. Clear Language and Measurable Conditions

Regarding the language and evaluation of the proposed condition, the Illinois Supreme Court in *Cassem v. Kennedy*<sup>140</sup> described the need for easily measurable conditions.<sup>141</sup> The will in *Cassem* provided that because a son was “wild, unsettled and irregular in his habits,” the son should not acquire the settlor’s property until the son “settles down in life and gets married” or reaches the age of forty.<sup>142</sup> The court held that the condition was not void for uncertainty because it was easy to determine whether he was married or had attained the age of forty.<sup>143</sup>

When drafting a condition in a will, testators often create their own dictionaries, requiring “the art” of judicial interpretation.<sup>144</sup> In *In re Hogg’s Estate*,<sup>145</sup> the Pennsylvania Supreme Court attempted to set forth a standard by which to interpret a testator’s language in an incentive condition.<sup>146</sup> According to the court, the testator’s intent is the most important factor, for the language is simply a means of expression.<sup>147</sup>

In addition to the mere language of the condition, the issue of whether the beneficiary has lived up to specified behavior expressed in the will is subject to individual variations of interpretation.<sup>148</sup> Either an arbiter or a court has the task of determining whether the benefactor has breached the condition.<sup>149</sup> When the personal conduct stipulated is fairly definite in nature, such as a requirement that an heir abstain from gambling or using intoxicating liquor, the task of evaluating the heir’s

<sup>139</sup> See *infra* Part II.E.4.

<sup>140</sup> 35 N.E. 738 (Ill. 1893). In this case, a provision requiring that a son mature was held valid even though it was written in uncertain terms. *Id.* at 739.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 738. Specifically, the language in the trust read: “As my son, Joseph Downey, is wild, unsettled and irregular in his habits, it is my will and desire that he shall not enjoy the benefit of this devise till he settles down in life and gets married, or until he arrives at the age of forty years . . .” *Id.*

<sup>143</sup> *Id.* at 739.

<sup>144</sup> *In re Funk Estate*, 45 A.2d 67, 70 (Pa. 1946).

<sup>145</sup> 196 A. 503 (Pa. 1938). In this case, the court tried to make a standard involving the testator’s intent for the language of an incentive condition. *Id.* at 505.

<sup>146</sup> *Id.* (“[T]he test is what [the testator’s] words meant to him and the thought which he intended to convey by them; language being but a medium of expression, the object of interpretation is to ascertain its import as used by the one who employs it.”).

<sup>147</sup> *Id.*

<sup>148</sup> RESTATEMENT (SECOND) OF PROP. § 8.2 cmt. b (1983).

<sup>149</sup> *Id.*

conduct is usually uncomplicated and therefore feasible.<sup>150</sup> Where no arbiter is designated and the criteria of the personal conduct are vaguely defined, courts are generally unwilling to accept the task of examining the condition and evaluating it to the benefactor's conduct.<sup>151</sup> The unwillingness of the courts to examine vague criteria in a condition normally results in a finding that the restraint is void for indefiniteness.<sup>152</sup>

When the testator does not appoint a specific arbiter and the conditions are vague, courts have been reluctant to hold the condition valid.<sup>153</sup> In *Jones v. Jones*,<sup>154</sup> the Missouri Supreme Court held that an

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<sup>150</sup> *Id.* When an arbiter is designated by the testatrix to decide whether a restraint has been violated, the arbiter's determination is conclusive unless there exists a judicial finding that the decision was influenced by something other than an honest attempt to evaluate the heir's conduct. *Id.* For example:

O, owning Blackacre in fee simple absolute, makes an otherwise effective deed stating, "to my son, S, and his heirs, but if S should ever enter into evil ways and acquire bad habits, I reserve the right to enter and terminate his estate." Several years later, O is offered a large sum for Blackacre. Without justification, O notifies S that he considers the condition violated and attempts to enter and terminate S's estate. His determination is not binding and an independent finding will be made by the court.

*Id.* § 8.2 illus. 3. Where no arbiter is designated and the criteria of the proscribed conduct is not so vague, the court is willing to accept the task of determining whether there has been a breach. *Id.* § 8.2 cmt b.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* For example:

O, by an otherwise effective will, devises \$50,000 "to my son S, on condition that S abandon his intemperate habits, immoral consortings and evil associations." No arbiter is designated. A finding is reasonable that the condition fails for indefiniteness, given the difficulty in defining with any certainty the standard of conduct to which S is to conform. S is entitled to the \$50,000 free of any condition.

*Id.* § 8.2 illus. 4. In order to avoid invalidating a restraint because of its indefiniteness when the proscribed conduct is a matter of individual opinion, courts often infer that the testatrix intended to have a trustee act as the arbiter. *Id.* Often the trustee may be the one who acts as the arbiter and determines whether a restraint has been violated despite the absence of a specific endorsement of an arbiter in a will. *Id.* A finding is often reasonable when the trustee is to be the intended arbiter because the trustee is usually the surviving spouse, other relative, or close friend of the testatrix. *Id.* The law provides an avenue for judicial review to avoid unreasonable exercises of power. *Id.*

<sup>153</sup> RESTATEMENT (SECOND) OF PROP. § 8.2 cmt. b (1983). A trustee is usually under a duty to the beneficiaries not to carry out a trust provision that the trustee knows or has reason to know is unlawful. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. e (2003). If the trust does not fail, the trustee has the duty to administer the property in a lawful manner to accomplish the trust's valid purposes. *Id.*

<sup>154</sup> 123 S.W. 29, 38 (Mo. 1909). In this case, the court held that a condition was void because of its uncertainty. *Id.*

incentive condition was void because of the condition's uncertainty.<sup>155</sup> The testator did not provide a trustee with discretionary power to decide whether the conditions had been met.<sup>156</sup> In addition, no rule or test existed to evaluate the beneficiary's conduct as it related to the condition.<sup>157</sup>

Further, in *Farmer's State Bank & Trust v. Mangold*,<sup>158</sup> the Illinois Supreme Court held that a condition that required heirs to "do that which is right" to receive a remainder was invalid for uncertainty.<sup>159</sup> The court stated that because the purpose of the condition was to influence conduct, the use of "an unexpressed personal and subjective yardstick for an expressed objective one would distort the testator's intent and make it difficult, if not impossible, for the donee to know the standard of conduct to which he is to conform."<sup>160</sup>

According to the Restatement, if a trust provision is not upheld as it is written and it is susceptible to adaptation to accommodate both public policy concerns and legitimate settlor objectives, the court may adapt the provision.<sup>161</sup> Thus, a provision may fail as it was originally designed, but the provision may, nevertheless, be judicially reformed to accomplish the allowable objectives while removing or minimizing socially undesirable effects.<sup>162</sup>

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<sup>155</sup> *Id.* The testator left property to his sons for twenty years. *Id.* at 30. At the expiration of the twenty years, if the sons could show themselves to be competent to manage the estate and to be "sober, industrious and not to be spendthrifts," then the estate would be expanded to a fee simple. *Id.* at 32. If the sons were not reformed, they would have only a life estate. *Id.* Consequently, the court held that the sons received the property in fee simple at the death of their father. *Id.* at 38.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (quoting *Schumacker's Estate v. Reel*, 61 Mo. 592, 600 (Mo. 1876)). Further, the court provided:

In every will creating legacies or trusts, there should be such certainty as will enable the court to carry them out. Where such uncertainty exists that the court cannot see what object the testator had in view, or for what he intended to provide, then the legacy or trust must fail.

*Id.* at 41.

<sup>158</sup> 114 N.E.2d 797 (Ill. 1953). In this case, the Illinois Supreme Court held that a condition requiring an individual to "do that which is right" was invalid because it was uncertain. *Id.* at 798, 801.

<sup>159</sup> *Id.* at 801. The heirs were two foster children, and the trustee was the foster mother and wife of the testator. *Id.* at 798.

<sup>160</sup> *Id.* at 799.

<sup>161</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i(1) (2003).

<sup>162</sup> *Id.* § 29 cmt. j. The judicial flexibility of altering the condition eliminates an all or nothing decision and eases speculation and other difficulties inherent in cases related to the validity of incentive conditions. *Id.*

Because people are increasingly passing down greater amounts of wealth, more people want to attach conditions on transfers of wealth in order to avoid the seemingly negative consequences of inherited wealth.<sup>163</sup> Individuals must consider the validity of their conditions when composing them. The Restatement sets forth some guidelines, but it leaves what actually violates public policy open to interpretation.<sup>164</sup> Further, states do not always have clear rules to determine the validity of the conditions.<sup>165</sup> The next Part of this Note addresses the need for states to adopt statutes regarding the validity of incentive conditions in order to promote a testator's freedom to distribute wealth as desired and avoid a mass of litigation resulting from the freedom some testators have taken in drafting incentive conditions.<sup>166</sup>

### III. ANALYSIS

In order to avoid conflict and excessive litigation, states must legislatively allow incentive conditions within certain limitations.<sup>167</sup> States should explicitly describe and codify statutory limitations to incentive conditions to avoid uncertainty and promote a testator's freedom to distribute his wealth as he desires.<sup>168</sup> Codifying the limitations on incentive conditions, while allowing all others, will also give beneficiaries the freedom of choice, minimize dead-hand control, and reduce inefficient litigation.<sup>169</sup> Part III.A analyzes the reasons that states should allow incentive conditions within certain limitations.<sup>170</sup> Part III.B examines current case law, statutes, and the Restatements, finding that they do not sufficiently address incentive conditions and provides methods so that states can successfully devise a statute that adequately covers incentive conditions.<sup>171</sup>

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<sup>163</sup> See *supra* notes 5, 17 and accompanying text.

<sup>164</sup> See *supra* Part II.D.

<sup>165</sup> See *supra* Part II.B.

<sup>166</sup> See *infra* Part III.

<sup>167</sup> See *infra* Part III.A.

<sup>168</sup> BOGERT & BOGERT, *supra* note 34, at § 1.

<sup>169</sup> See *infra* Part III.B.

<sup>170</sup> See *infra* Part III.A.

<sup>171</sup> See *infra* Part III.B. The lack of state provisions may lead to greater court supervision with respect to incentive conditions than is presently the case. BOGERT & BOGERT, *supra* note 34, § 1.

A. *Rationale Supporting Incentive Conditions*

In order to give testators the power and discretion to distribute their wealth in a desired manner, states should allow incentive conditions.<sup>172</sup> Because incentive conditions permit individuals to control their beneficiaries' actions and beliefs in positive ways even after they have passed, individuals who perceive themselves to be possible beneficiaries of a substantial inheritance will often feel bound to positively alter their lives.<sup>173</sup> For instance, incentive conditions prohibiting the use of illegal drugs may result in beneficiaries choosing to abstain from the use of illegal drugs in order to receive a large sum of money.<sup>174</sup> Decisions that positively alter a beneficiary's behavior are desirable to the testator, the beneficiary, and society in general.<sup>175</sup> The testator benefits because the beneficiary behaves in a way that the testator wanted him to behave; the beneficiary benefits because he is not using drugs and has more money; and society benefits because there is one less drug user in the community.<sup>176</sup> For many beneficiaries, the extra incentive of a substantial amount of money will motivate the beneficiary to make healthier or more productive life choices.<sup>177</sup>

Conditioning inherited wealth on a particular behavior also reduces the negative bias that may exist *against* inherited wealth.<sup>178</sup> Incentive conditions motivate beneficiaries to display good behavior, which will result in a more productive community as a whole.<sup>179</sup> Societal concerns regarding beneficiaries who squander their inherited dynasty decrease when society sees that the beneficiaries behave positively.<sup>180</sup> If the community knows that a beneficiary had to actually work productively to receive a large amount of money through a trust, the community will appreciate that the money was not simply handed to the beneficiary on a "silver platter."<sup>181</sup>

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<sup>172</sup> See *infra* Part III.A.

<sup>173</sup> See *supra* note 51 and accompanying text. "Positive ways" of altering a beneficiary's life is determined by the testator when the testator drafts the conditions.

<sup>174</sup> See *supra* notes 56, 59–60.

<sup>175</sup> See *supra* notes 56, 59–60.

<sup>176</sup> See *supra* notes 56, 59–60.

<sup>177</sup> See *supra* notes 56, 59–60.

<sup>178</sup> Langley & Gandara, *supra* note 51, at D1. "Financial parenting" by means of incentive conditions is also a sound way to avoid having to pay estate taxes. *Id.*

<sup>179</sup> See *supra* note 59.

<sup>180</sup> See *supra* note 42 and accompanying text.

<sup>181</sup> See *supra* note 42 and accompanying text.

Incentive conditions also provide testators the freedom to draft wide-ranging, highly specific provisions for their children's welfare and to support the beliefs of the testators.<sup>182</sup> For example, in *Shapira*, the testator's goal of providing for the advancement of the Jewish faith allowed the beneficiary to decide whether he would marry a Jewish woman, which would cause him to receive his father's wealth, or not marry a Jewish woman, which would cause the State of Israel to receive the inheritance.<sup>183</sup> The court in *Shapira* correctly recognized the importance of the testator's wish to motivate the advancement of his religion.<sup>184</sup> This freedom to permit a testator to describe how he wishes to distribute his wealth is essential because it allows the testator to direct his wealth as he would if he were alive.<sup>185</sup> The freedom to create incentive conditions still allows the beneficiary to control his own life as long as state statutes impose certain limitations on incentive conditions.<sup>186</sup>

Just as an individual can disinherit someone from his will without providing a reason, the same individual should be allowed to articulate incentive conditions in trusts that limit another from receiving his wealth.<sup>187</sup> Because states do not question the reasoning behind an individual's decision to disinherit another, states should not scrutinize an incentive condition in a trust unless a major public policy flaw exists in the testator's condition.<sup>188</sup> Incentive conditions, when used correctly, are beneficial to reinforce the values that have already been instilled in the beneficiaries.<sup>189</sup> However, incentive conditions should not punish

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<sup>182</sup> See *supra* note 120 and accompanying text.

<sup>183</sup> See *supra* notes 122-24 and accompanying text.

<sup>184</sup> See *supra* notes 122-24 and accompanying text.

<sup>185</sup> See *supra* notes 122-24 and accompanying text. However, no court will tolerate the condition if the action required is illegal. See *supra* note 73 and accompanying text.

<sup>186</sup> See *infra* Part IV for a sample statute describing the limitations.

<sup>187</sup> See *supra* note 120 and accompanying text. If a person with a will can include or exclude another from his will for any reason he wants, he should be able to include or exclude another from his trust for any reason he wants. *U.S. Nat'l Bank of Portland v. Snodgrass*, 275 P.2d 860, 872 (Or. 1954). Because an individual earned his money, he should be able to transfer the money using any incentive condition he wishes to describe. *Id.*

<sup>188</sup> *Snodgrass*, 275 P.2d at 872. However, a court may invalidate a will when an individual contests the will where the testator has disinherited the individual based on theories of a lack of mental capacity or undue influence. *Estate of Lewis*, 770 A.2d 619, 621 (Me. 2001). For an explanation of the types of public policy flaws, see *infra* Parts III.B.3, IV (discussing the limitations that should be contained in a statute).

<sup>189</sup> *Clark Hill PLC*, *supra* note 58. *Lansky* stated that reaction to trust restrictions can be strong resentment, or even hatred, when a beneficiary feels that the trust's restrictions are unfair. *Id.* In addition, in some situations, the beneficiary may even "overvalue the action that was unfairly restricted." *Id.*

behavior the settlor considers wrong.<sup>190</sup> For instance, when the condition in *Brizendine* only awarded the beneficiary if he had nothing to do with his wife, the purpose of the condition was to punish the beneficiary for staying married to a woman that the testatrix did not favor.<sup>191</sup>

Although incentive conditions should be allowed because of the testator's right to control his wealth, counterarguments do exist.<sup>192</sup> The first concern is that incentive conditions may unreasonably hinder a beneficiary's freedom of choice, as illustrated in *Maddox*, where the court failed to honor a provision that intruded on a beneficiary's freedom to marry.<sup>193</sup> A second counterargument is that incentive conditions that require a reasonableness interpretation inevitably vary, inviting conflict and litigation.<sup>194</sup> A third criticism of incentive conditions is that they can lead to a "carrot and stick" approach to transferring wealth, which can cause tension within families because the whole notion of incentive conditions implies distrust.<sup>195</sup> The carrot and stick approach implies distrust because a beneficiary is portrayed as doing anything the testator conditioned in order to obtain the testator's wealth, eliminating the beneficiary's free choice.<sup>196</sup> A fourth counterargument is that incentive conditions perpetuate dead-hand control, the ability to control others from the grave.<sup>197</sup> Finally, the fifth concern is that testators will

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<sup>190</sup> *Id.*

<sup>191</sup> *See supra* notes 111–14 and accompanying text.

<sup>192</sup> *See infra* notes 193–98 and accompanying text.

<sup>193</sup> *See supra* note 109 and accompanying text. Further, an individual's intentions will not be fulfilled when a court invalidates a condition that the individual has prescribed. *Maddox v. Maddox*, 52 Va. 804, 808 (1854).

<sup>194</sup> *See supra* text accompanying notes 80, 103.

<sup>195</sup> Langley & Gandara, *supra* note 51, at D1. The carrot and stick approach compares incentive conditions to dangling a carrot in front of an animal to get the animal to do something. *Id.* Further, Hoge states that "[e]ven after the parents are dead, the child will feel like, 'I'm still being put to the test.'" *Id.* Critics charge that such trusts bring a "carnival-like atmosphere to trust administration—hit the target, get a prize." Wells, Marble & Hurst PLLC, *supra* note 58. Critics of family incentive trusts also claim that the increasing popularity of incentive conditions make it clear that knowing how to make millions implies nothing about knowing how to raise a family. Katherine Hennessey Wikoff & Rachel Eisenman, *The Trust-Fund Dole: King Lear Syndrome?*, WALL ST. J., Dec. 3, 1999, at A15. The critics point out that controlling purse strings are demonstrated in Shakespeare's play, *King Lear*, where the strings attached to the inheritance strangles the giver and recipient. *Id.* In addition, in the play, the only daughter to love her father in the end is the one who refuses to let the conditions run her life. *Id.* The concept of family incentive conditions has the potential to become an obscene form of bribery that has significant flaws unless states codify some guidelines and restrictions on the ability to control from the grave through incentive conditions. *Id.*

<sup>196</sup> *See supra* note 195 and accompanying text.

<sup>197</sup> Whiting, *supra* note 4, at 8. Hobhouse wrote 125 years ago about the "cold and numbing influence of the Dead Hand":

ambiguously describe the standards necessary to measure a condition or fail to adequately name an individual who is to evaluate the beneficiary's conduct.<sup>198</sup> Although these are legitimate concerns, they are not persuasive reasons to entirely invalidate incentive conditions because states can adopt statutes to address the criticisms, as discussed in the next Part.<sup>199</sup>

*B. Inadequacies of Current Case Law, Statutes, and Restatements*

Instead of allowing every incentive condition, states should legislatively permit incentive conditions but codify specific limitations to guard against abuse.<sup>200</sup> By placing limits on the use of incentive conditions, states can allow a testator to distribute his wealth as desired but simultaneously prevent excessive limits on beneficiaries' rights through dead-hand control.<sup>201</sup> By creating a uniform statutory provision regarding incentive conditions, the fear of varying decisions by courts may also be addressed and resolved.<sup>202</sup>

States have at least three general options available regarding how to handle incentive conditions in order to avoid tying up the courts with

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A clear, obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know and see. Within the former province we may push his natural affections and his capacity of judgment to made better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events . . . people are the best judges of their own concerns; or if they are not, that it is better for them, on moral grounds, that they should manage their own concerns themselves, and that it cannot be wrong continually to claim this liberty for every Generation of mortal men.

ARTHUR HOBHOUSE, *THE DEAD HAND* 183-85 (1880). The general, time-honored rule, as illustrated in *Snodgrass*, that an individual is free to dispose of his property as he sees fit, with or without restrictions or conditions, also has flaws because of the testators' ability to control others from the grave. Whiting, *supra* note 4, at 11. The law is less tolerant of dead-hand control. *Id.* When an individual's trust attempts to control another from the grave, even with the best of intentions, the beneficiary may retaliate against the strings that are attached to the wealth because of the beneficiary's hatred and resentment. Clark Hill PLC, *supra* note 58. One of the objectives of the Rule Against Perpetuities is to put a finite limit on dead-hand control by limiting the number of years that a trust can control the choices and behaviors of other individuals. *See supra* note 78.

<sup>198</sup> *See infra* notes 236-47.

<sup>199</sup> *See supra* Part III.B.

<sup>200</sup> *See infra* Part IV for a sample statute with specific limitations.

<sup>201</sup> *See supra* notes 78, 97; *see also infra* notes 226-35 and accompanying text.

<sup>202</sup> *See infra* text accompanying notes 228-30.

future litigation.<sup>203</sup> This Part analyzes the three possible options for states.<sup>204</sup> The first option is to adopt and codify the Restatement's policy as set forth in section 29.<sup>205</sup> The second option is to adopt only the first two requirements of the Restatement: the requirement concerning the Rule Against Perpetuities and the requirement that an incentive condition not reward illegal activities.<sup>206</sup> Finally, the third option is to develop codified restrictions relating to specific instances that invalidate an incentive condition, allowing conditions that do not fit any named restriction.<sup>207</sup>

### 1. Codifying the Restatement

The first option, adopting and codifying the Restatement, does not sufficiently address the problems related to incentive conditions because the courts would be left to determine which particular conditions satisfy the ambiguous statute.<sup>208</sup> A state that adopts this option will encourage individuals to utilize incentive conditions and allow the state courts to determine which particular conditions satisfy the ambiguous statute.<sup>209</sup> The Restatement merely provides that particular incentive conditions may fail if the provision is against public policy, leaving the courts to determine exactly which provisions fail because of public policy.<sup>210</sup> Forcing the courts to determine the validity of specific conditions invites confusion and litigation, while, at the same time, families involved in condition disputes are divided over the distribution described in a condition.<sup>211</sup> As illustrated in *Lewis*, a potential beneficiary may never know definitively whether he has satisfied the condition and may have to bring multiple lawsuits to determine the condition's validity.<sup>212</sup>

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<sup>203</sup> See *infra* text accompanying notes 204–07.

<sup>204</sup> See *infra* notes 208–47 and accompanying text.

<sup>205</sup> See *infra* notes 208–16 and accompanying text.

<sup>206</sup> See *infra* notes 217–23 and accompanying text.

<sup>207</sup> See *infra* notes 224–48 and accompanying text. The Restatement provides that an incentive condition is invalid if it calls for the beneficiary to commit a criminal or tortious act, if it violates the applicable Rule Against Perpetuities, or if it is against public policy. RESTATEMENT (THIRD) OF TRUSTS § 29 (2003).

<sup>208</sup> See *supra* Part II.D.

<sup>209</sup> See *supra* Part II.D.

<sup>210</sup> See *supra* Part II.D.

<sup>211</sup> See *supra* Part II.D.

<sup>212</sup> See *supra* notes 89–95 and accompanying text. In *Estate of Lewis*, the court determined that a beneficiary's challenge of an anti-harassment clause was void at that time because the issue was not ripe at the time of the decision. 770 A.2d 619, 624 (Me. 2001).

Therefore, the current form of the Restatement has unfortunate consequences.<sup>213</sup> Fearing that a court may invalidate a certain condition, the individual may feel compelled to conservatively alter a desired condition or choose to not include the condition at all, which will prevent him from distributing his wealth as he desires.<sup>214</sup> However, individuals should have the right to decide how to distribute their wealth by using incentive conditions, just as individuals have the right to distribute their wealth by disinherit others during their lifetime.<sup>215</sup> Thus, adopting and codifying the Restatement may hurt a testator more than it helps him.<sup>216</sup>

## 2. Codifying the First Two Restatement Clauses

Because the Restatement's current form regarding public policy creates ambiguity, a second option for states is to adopt a statute that only requires an incentive condition to comply with the Rule Against Perpetuities or not require illegal activity.<sup>217</sup> However, this option also does not sufficiently address the full issues of incentive conditions.<sup>218</sup> By adopting this option, a state's legislation conveys that it values an individual's freedom to make conditions and encourages an individual to include incentive conditions in his will or trust.<sup>219</sup> A state may choose this option because an individual's wealth is his own, and he should have the freedom to transfer his wealth in the way that he sees fit.<sup>220</sup> In addition, conditions do not impose a loss on an heir because the money never belonged to the heir in the first place.<sup>221</sup>

While allowing virtually any incentive condition gives individuals freedom to transfer their wealth in any manner they choose, regardless of public policy, the financial incentives for potential beneficiaries may

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<sup>213</sup> See *supra* notes 102-04 and accompanying text for an illustration of a condition that a court voided.

<sup>214</sup> See *supra* notes 102-04 and accompanying text.

<sup>215</sup> See *supra* notes 102-04 and accompanying text.

<sup>216</sup> See *supra* notes 208-15 and accompanying text.

<sup>217</sup> See *supra* note 73 and accompanying text. For example, this statute will read:

Section 2: Validity of Incentive Conditions

An incentive condition contained in a trust or will is invalid if it (a) violates rules relating to perpetuities or (b) contains a purpose that is unlawful or its performance calls for the commission of a criminal or tortious act.

<sup>218</sup> See *infra* notes 220-23 and accompanying text.

<sup>219</sup> See *infra* notes 220-23 and accompanying text.

<sup>220</sup> See *supra* notes 115-18, 187 and accompanying text.

<sup>221</sup> See *supra* text accompanying note 134; *supra* notes 132-35 and accompanying text.

unreasonably control the beneficiary's life.<sup>222</sup> Although the Rule Against Perpetuities addresses the issue of dead-hand control by limiting the period of time in which a testator can control another to twenty-one years, the restriction alone is inadequate because the Rule Against Perpetuities does not reach the control a testator can have over a beneficiary when the period is less than the twenty-one years.<sup>223</sup>

### 3. Codifying Certain Limitations Involving Public Policy

In contrast to the first two options, the third option, allowing incentive conditions but codifying limitations to the allowance of such conditions, *does* sufficiently address incentive condition issues because it permits the conditions but provides boundaries for testators to work within.<sup>224</sup> In order to effectively describe requirements concerning incentive conditions, a state must address a wide range of public policy issues that may lead to confusion and conflict, such as the freedoms to associate, marry, and practice a religion.<sup>225</sup>

The counterarguments of incentive conditions as applied to this third option should be addressed. The argument that an incentive condition hinders a beneficiary's freedom of choice fails because beneficiaries do not have rights to the money.<sup>226</sup> Further, the law demonstrates that if the testators have some public policy limits placed upon them, then the issue of beneficiary's rights will be non-existent.<sup>227</sup>

Addressing the second concern, a purpose of the uniform state statute is to remedy varying decisions by the courts.<sup>228</sup> Delineating which incentive conditions are invalid will provide more detailed guidelines for determining public policy violations in order to avoid future litigation.<sup>229</sup> With a clear and exclusive list of invalidating conditions, individuals who desire to transfer their wealth may create incentive conditions and know that the conditions will be valid by running the conditions through the guidelines of the statute.<sup>230</sup>

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<sup>222</sup> See *supra* notes 102-04 and accompanying text (describing a case where one woman's inheritance was conditioned on her marrying one of six men).

<sup>223</sup> See *supra* note 51.

<sup>224</sup> See *infra* text accompanying notes 225-48.

<sup>225</sup> See *supra* note 187.

<sup>226</sup> See *supra* notes 192-93 and accompanying text.

<sup>227</sup> See *supra* notes 110-14 and accompanying text.

<sup>228</sup> See *supra* note 194 and accompanying text.

<sup>229</sup> See *supra* Part II.E.4.

<sup>230</sup> See *supra* Part II.E.4.

With respect to the carrot and stick concern, potential beneficiaries will profit because the statute will ensure that the beneficiaries' free will is not stripped from them and the conditions will be more reasonable.<sup>231</sup> By setting out the invalid incentive conditions, beneficiaries and testators will know ahead of time what is and is not appropriate.<sup>232</sup>

The fourth counterargument, dead-hand control, while not necessarily always advantageous, can be beneficial in promoting productivity or values, and thus limitations will keep the condition from violating any public criticism of dead-hand control.<sup>233</sup> Further, as circumstances and social policy changes, legislation can alter the list of limitations to ensure reasonableness through ratifications and amendments.<sup>234</sup> Having the ability to amend the statute, a state's legislation will provide families definite rules regarding the validity of a condition, which will in turn minimize conflicts within families and reduce litigation in the courts.<sup>235</sup>

Finally, addressing the fifth concern regarding ambiguity within the condition, a state's statute should describe the necessary language the condition must contain as well as the standards by which to measure the beneficiary's behavior.<sup>236</sup> Not only must the settlor possess the intent to have a trust, but the settlor must also express his intent effectively in writing or by communicating it to another.<sup>237</sup> Although using formal or

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<sup>231</sup> See *supra* text accompanying notes 195-96.

<sup>232</sup> See *supra* text accompanying notes 195-96.

<sup>233</sup> See *supra* note 197 and accompanying text.

<sup>234</sup> See *supra* note 197 and accompanying text.

<sup>235</sup> See *supra* Part II.E.4.

<sup>236</sup> See *supra* text accompanying note 198.

<sup>237</sup> GEORGE T. BOGERT, TRUSTS § 11 (2d ed. 1987 & Supp. 2004). Bogert refers to language in *Semple v. Semple*, 105 So. 134, 136 (Fla. 1925), which states:

The grantor's intention, with which he executes a deed of conveyance to another, which intention he does not reveal at the time of the conveyance and of which the grantee knows nothing, and the circumstances of the transaction are not of such character that an intention of the parties to create a trust may be presumed, does not create a trust upon the land conveyed. In both an express and resulting trust the element of intention to create a trust must exist between the parties. In one case the intention is expressed, in the other it is implied. A constructive trust arises entirely by the operation of law without reference to any actual or supposed intention of creating a trust and often directly contrary to such intention. They are entirely *in invitum* and are forced upon the conscience of the trustee for the purpose of working out right and justice or frustrating fraud.

*Id.* "A trust is created only if the settlor properly manifests an intention to create a trust relationship." RESTATEMENT (THIRD) OF TRUSTS § 13, Intention to Create Trust (2003).

technical language is not a prerequisite to determine the validity of a trust, the settlor must clearly describe his desired provisions and standards.<sup>238</sup> In his will, a testator must also name the person who shall determine whether the beneficiary has met the behavior set forth in the provisions.<sup>239</sup> The only public policy requirement is that the trustee is to have the functions and duties that are incidental to trusteeship.<sup>240</sup> For instance, the *Laning* court reconciled its decision with the *Drace* court's decision by explaining the difference between the language and standards of the provisions, where a "remain[] faithful" condition was invalid because of vagueness, while a condition requiring beneficiaries to remain "members in good standing of the Presbyterian Church" was valid.<sup>241</sup>

Furthermore, to create a trust, a settlor must show his intent with certainty and provide the terms of the trust.<sup>242</sup> For example, the *Jones* court found that the testator did not provide for a trustee with discretionary power to decide whether the conditions had been met.<sup>243</sup> In addition, the trust in *Jones* provided no rule or test to evaluate the

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<sup>238</sup> BOGERT & BOGERT, *supra* note 34, § 1 (referring to *Teal v. Pleasant Grove Local Union No. 204*, 75 So. 335 (Ala. 1917)). Specifically, George G. Bogert and George T. Bogert's hornbook on trusts states:

In order to create an express trust the settlor's intent must be expressed and not merely formed in his own mind. Although it may be expressed (subject to formality requirements later stated) by conduct of the settlor, the use of written or spoken words is the method almost universally employed. The trust property and the beneficiaries must be described with certainty. No particular words or phrases need be used, and words of trusteeship are not necessarily conclusive.

BOGERT & BOGERT, *supra* note 34, § 11.

<sup>239</sup> BOGERT & BOGERT, *supra* note 34, § 11.

<sup>240</sup> *Id.* § 1, at 466. In some cases, the courts have found that an expression made by the settlor contained the intent to create a trust even though the settlor did not set up a trust himself. *Id.* Also, consider *In re Butler's Will*, where an intent to have a trust was shown when the settlor expressed his intent that the gift for the beneficiary should be managed by another person because of the beneficiary's inability to manage the gift herself. 151 N.Y.S.2d 866 (N.Y. App. Div. 1956).

<sup>241</sup> See *supra* notes 136–39 and accompanying text; see also *supra* notes 117, 150 (discussing the effects of a vague condition). Further, the *Cassem v. Kennedy* court stated: "Had the conditions stopped with the words 'till he settles down in life,' it might have been said the event was not capable of definite ascertainment,—that is to say, there might be a difference of opinion as to whether a man had 'settled down in life.'" 35 N.E. 738, 739 (Ill. 1893); see *supra* notes 140–43.

<sup>242</sup> BOGERT & BOGERT, *supra* note 34, § 1.

<sup>243</sup> *Jones v. Jones*, 123 S.W. 29, 38 (Mo. 1909); see *supra* notes 153–57 and accompanying text.

heir's conduct as it related to the condition.<sup>244</sup> Courts that invalidate a condition because the testator failed to describe a specific standard of conduct have ruled correctly because if a beneficiary is to meet a certain condition, a testator must specifically describe the standard that measures the beneficiary's conduct.<sup>245</sup> Standards for meeting an incentive condition are essential because a beneficiary will know exactly what he has to do to receive the wealth that the testator is willing to transfer to him.<sup>246</sup> Furthermore, when a testator clearly knows the state's standards by which the state evaluates the testator's conditions, the testator will be certain that the condition he drafted will be valid.<sup>247</sup>

Thus, in order to allow an individual freedom to transfer his wealth as he sees fit, while ensuring potential beneficiaries reasonable conditions, a state should adopt a statute that provides a list involving specific instances that will invalidate an incentive condition.<sup>248</sup> Part IV provides an example of a state statute that addresses specific incentive conditions with codified limitations.<sup>249</sup>

#### IV. CONTRIBUTION

States may face increased litigation if they fail to adopt a statute that sufficiently addresses incentive conditions.<sup>250</sup> States have several options in adopting a statute to deal with the validity of incentive conditions.<sup>251</sup> Some of the options for a statute regulating incentive conditions include: (1) a statute that is similar to the Restatement, which allows an incentive condition that does not require illegal activity, does not violate the Rule Against Perpetuities, and does not violate public policy; (2) a statute, where the only restrictions are the Rule Against Perpetuities and a condition that calls for an unlawful, criminal, or tortious act; or (3) a statute that contains specific incentive conditions that are invalid,

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<sup>244</sup> *Jones*, 123 S.W. at 38. Further, some courts have found that the conditions were sufficiently certain while others have found enough vagueness and indefiniteness in similar conditions to render the trusts void. BOGERT & BOGERT, *supra* note 34, § 1.

<sup>245</sup> *See supra* notes 158–60 and accompanying text.

<sup>246</sup> *See supra* notes 158–60 and accompanying text.

<sup>247</sup> *See supra* text accompanying note 168.

<sup>248</sup> *See infra* Part IV for a statute and the description of the statute that provides specific limitations regarding incentive conditions.

<sup>249</sup> *See infra* Part IV.

<sup>250</sup> *See supra* Part III.

<sup>251</sup> *See supra* Part III.

including the particular topics that violate public policy and lack the requisite descriptive language of the condition.<sup>252</sup>

First, this Note proposes that states should allow incentive conditions.<sup>253</sup> Further, states should adopt statutes that take the uncertainty out of public policy. Finally, this Note proposes that states not only address incentive conditions by statute, but that states adopt statutes that contain specific incentive conditions that are invalid in addition to ones that simply violate public policy. Thus, this Part provides a sample statute with corresponding commentary that allows incentive conditions while codifying specific limitations.

#### A Proposed Statute Involving Incentive Conditions

##### *Section 1: Incentive Conditions Presumed Valid*

*An incentive condition in a will or trust is presumed valid and is invalid only if described in Section 2 or Section 3.*

##### *Section 2: Validity of Incentive Conditions*

*An incentive condition contained in a trust or will is invalid if it: (a) violates rules relating to perpetuities; (b) contains a purpose that is unlawful or its performance calls for the commission of a criminal or tortious act; (c) is intended only to threaten a beneficiary with no intention of legally enforcing the condition; (d) restricts a beneficiary's right to marry any individual unless the money is clearly for support until a beneficiary marries; (e) restricts a beneficiary's right to associate with particular individuals; or (f) restricts the right of an individual to practice a particular religion.*

##### *Section 3: Language and Standards of an Incentive Condition*

*An incentive condition is invalid when: (a) the terms of the condition are ambiguous or unclear; (b) the condition cannot be reasonably measured; or (c) the individual determining whether a condition is met has a personal interest in the evaluation.<sup>254</sup>*

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<sup>252</sup> See *supra* Part III.

<sup>253</sup> See *supra* Part III.

<sup>254</sup> The proposed statute is italicized and is the contribution of the author.

Commentary

A statute that clearly states limitations to incentive conditions will provide guidelines for conditions that violate public policy, which will avoid future litigation.<sup>255</sup> States that choose to adopt an expansion of the Restatement should provide further guidelines as to the validity of an incentive condition in order to avoid future litigation.<sup>256</sup> With more guidelines, individuals who desire to transfer their wealth may create incentive conditions and know the conditions will be valid by running the conditions through the guidelines of the statute.<sup>257</sup> Potential beneficiaries will appreciate such a statute because it will ensure that the beneficiaries' free will is not stripped from them and the conditions will be more reasonable.<sup>258</sup>

The first section of the statute simply states the presumption that any incentive condition is valid if it does not fall into any of the following sections of the statute. Thus, to easily determine if a given condition is valid, an individual must ensure that the condition does not have traits described in the next two sections.

The second section lists specific ways that an incentive condition could fail. As mentioned in the Restatement, the first two subsections address the Rule Against Perpetuities and any condition that calls for a criminal or tortious act.<sup>259</sup> Subsection (c) concerns in terrorem provisions. In terrorem provisions are merely empty threats, as discussed earlier, and it is beneficial to prohibit such conditions to promote efficiency in the courts and tranquility among families.<sup>260</sup> Subsections (d) and (e) address the general right for a beneficiary to marry and associate. However, within the subsection, one exception exists for conditions that put a restraint on marriage when its purpose is clearly for support of the beneficiary. Finally, subsection (f) states that no individual can restrain another's religious choice. An individual can encourage a particular religion but cannot condition a transfer upon another not choosing a particular religion.<sup>261</sup>

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<sup>255</sup> See *supra* Part III.C.

<sup>256</sup> See *supra* Part III.C.

<sup>257</sup> See *supra* Part III.C.

<sup>258</sup> See *supra* Part III.C.

<sup>259</sup> See *supra* note 73 for the specific language of the Restatement.

<sup>260</sup> See *supra* Part II.E.1.

<sup>261</sup> For example, a condition is valid when it reads: "To A if A is a member of the Catholic church," because the condition merely encourages a religion. However, a

Section three of the proposed statute describes the language required to render an incentive condition valid. Each subsection is present in order to promote efficiency. Subsection (a) requires clear terms, forcing drafters to consider potential ramifications of various interpretations of a condition in order to ensure the validity of the condition. Further, unless the terms are reasonably measurable, no reason exists to contain the condition because immeasurable conditions invite conflicts and confusion. Finally, to avoid the problem of having trustees with conflicting interests regarding the evaluation of the condition, subsection (c) states that a trustee must not have the potential to gain financially depending on his evaluation of the condition. Thus, the proposed statute adequately incorporates the freedom to include incentive conditions in a will or trust while providing specific public policy guidelines that allow beneficiaries the freedom to make life choices as well.

#### V. CONCLUSION

In sum, individuals will transfer a magnitude of wealth in the upcoming years. Individuals are increasingly attaching conditions in their wills and trusts that a beneficiary must meet in order to receive any or all of the assets. The conditions reflect the desires of the testator, including family and religious desires as well as work productivity standards. The number of individuals attaching conditions that depend on behavior is growing, just as the creativity of the conditions is expanding. The conditions may encourage or completely control the actions of the beneficiary, and receiving money may depend on the behavior or beliefs of the beneficiaries.

While individuals are relying on incentive conditions, many states do not address the validity of incentive conditions in their statutes. Further, case treatment of incentive conditions is limited while the amount of creativity used in making the conditions is growing. The validity of an incentive condition is often subject to interpretation, which leads to litigation. Individuals wishing to attach incentive conditions to their wealth deserve to know their state's guidelines and limits regarding the validity of an incentive condition so that their wishes for their wealth distributions are met.

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condition is invalid when it reads, "To A, but not if A is a member of the Catholic church," because the condition restricts A's right to practice a particular religion.

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States should provide its citizens with an exclusive list of the types of conditions that invalidate an incentive condition. Such a statute will provide the assurance that a condition is valid, grant potential beneficiaries freedom to prohibit anyone from controlling them for reasons that are destructive, and decrease unnecessary and inefficient litigation.

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